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Nov 5

34

REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1894.

---

VOLUME XXXIX.

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D. A. CAMPBELL,

OFFICIAL REPORTER.

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LINCOLN, NEB.:

STATE JOURNAL COMPANY, LAW PUBLISHERS.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,  
In behalf of the people of Nebraska.

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*Rec. Jan 1, 1895.*

# THE SUPREME COURT

OF

NEBRASKA.

1894.

---

CHIEF JUSTICE,  
T. L. NORVAL.

JUDGES,  
A. M. POST,  
T. O. C. HARRISON.

COMMISSIONERS,  
ROBERT RYAN,  
JOHN M. RAGAN,  
FRANK IRVINE.

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OFFICERS.

ATTORNEY GENERAL,  
GEORGE H. HASTINGS.

CLERK AND REPORTER,  
D. A. CAMPBELL.

DEPUTY CLERK,  
W. B. ROSE.

# DISTRICT COURTS OF NEBRASKA.

## JUDGES.

### *First District—*

A. H. BABCOCK.....Beatrice.  
J. E. BUSH.....Beatrice.

### *Second District—*

S. M. CHAPMAN.....Plattsmouth.

### *Third District—*

CHARLES L. HALL .....Lincoln.  
JESSE B. STRODE.....Lincoln.  
A. S. TIBBETS .....Lincoln.

### *Fourth District—*

G. W. AMBROSE .....Omaha.  
J. H. BLAIE .....Omaha.  
A. N. FERGUSON .....Omaha.  
M. R. HOPEWELL.....Tekamah.  
W. W. KEYSOR.....Omaha.  
C. R. SCOTT .. .....Omaha.  
W. C. WALTON.....Blair.

### *Fifth District—*

EDWARD BATES.....York.  
ROBERT WHEELER .....Osceola.

### *Sixth District—*

WM. MARSHALL .....Fremont.  
J. J. SULLIVAN .....Columbus.

### *Seventh District—*

W. G. HASTINGS.....Wilber.

### *Eighth District—*

W. F. NORRIS.....Ponca.

### *Ninth District—*

J. S. ROBINSON.....Madison.

### *Tenth District—*

F. B. BEALI. ....Alma.

### *Eleventh District—*

A. A. KENDALL .....St. Paul.  
J. R. THOMPSON.....Grand Island.

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SILAS A. HOLCOMB .....	Broken Bow.
<i>Thirteenth District—</i>	
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<i>Fourteenth District—</i>	
D. T. WELTY.....	Cambridge.
<i>Fifteenth District—</i>	
ALFRED BARTOW.....	Chadron.
M. P. KINKAID.....	O'Neill.



## SUPREME COURT COMMISSIONERS.

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(Laws 1893, chapter 16, page 150.)

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SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

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The syllabus in each case was prepared by the judge or commissioner writing the opinion.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF NEBRASKA.**

**JANUARY TERM, A. D. 1894.**

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**PRESENT:**

**HON. T. L. NORVAL, CHIEF JUSTICE.**

**HON. A. M. POST,**  
**HON. T. O. C. HARRISON, } JUDGES.**

**HON. ROBERT RYAN,**  
**HON. JOHN M. RAGAN, } COMMISSIONERS.**  
**HON. FRANK IRVINE, }**

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**FREEMAN P. KIRKENDALL ET AL. V. CITY OF OMAHA.**

**FILED JANUARY 16, 1894. No. 4813.**

- 1. Change of Grade of Streets: DAMAGES: EVIDENCE.** After a witness had stated what in his opinion had been the effect of changing the grade of a street upon property adjacent thereto owned by the plaintiffs in error, it was not reversible error to refuse to allow such witness further to testify that in his opinion no cause other than the said change of grade contributed to an asserted decrease in value of said adjacent property, especially in view of the fact that one of the plaintiffs in error had previously given negative testimony of the same character as that sought to be introduced, which negative testimony was in no way questioned or contradicted upon the trial.

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Kirkendall v. City of Omaha.

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2. ———: ———: ———. It was not error to reject evidence offered as to the general tendency of values of other real property than that of plaintiffs in error, in its vicinity, extending over the period during which and immediately following that in which the change of grade complained of was made.
3. The special benefits which may be properly set off against damages are such as increase the value of adjacent property, and these benefits are none the less special because an increased value has been thereby added to many adjacent private properties other than that as to which a particular litigation is pending. Common benefits are such as are enjoyed by the public at large without reference to the ownership of private property adjacent to the public improvement out of which arose the benefits under consideration.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

The opinion contains a statement of the case.

*Montgomery, Charlton & Hall*, for plaintiffs in error, contending that there was error in the instructions, cited: *Wagner v. Gage County*, 3 Neb., 242; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 591; *Schaller v. City of Omaha*, 23 Neb., 332; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 544.

*W. J. Connell* and *E. J. Cornish*, for the city:

It was for the jury to determine whether or not the property had been damaged, and if so, whether or not the grade was the cause of the damage; but this must be determined from facts offered in evidence and not as conclusions of witnesses. (*City of Omaha v. Kramer*, 25 Neb., 490; *Burlington & M. R. Co. v. White*, 28 Neb., 167; *Roberts v. New York E. R. Co.*, 28 N. E. Rep. [N. Y.], 486.)

The instructions given were not erroneous. (*City of Omaha v. Schaller*, 26 Neb., 524; *Lowe v. City of Omaha*, 33 Neb., 587; *Bohm v. Metropolitan E. R. Co.*, 29 N. E. Rep. [N. Y.], 802; *Sutro v. Metropolitan E. R. Co.*, 33

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N. E. Rep. [N. Y.], 334; *Hanscom v. City of Omaha*, 11 Neb., 37; *Lansing v. City of Lincoln*, 32 Neb., 470; 2 Dillon, Mun. Corp., p. 933; 2 Desty, Taxation, p. 1238.)

*A. J. Poppleton*, also for defendant in error.

RYAN, C.

The plaintiffs in this action, who are the plaintiffs in error in this court, sought in the district court of Douglas county, Nebraska, a recovery against the defendant on account of alleged injury to their property in blocks 9 and 12, in West Omaha, caused by the grading of Leavenworth street on the south side of block 12, and the streets connecting therewith, to-wit, Thirty-seventh and Thirty-eighth streets, extending along the east and west sides of said blocks. The plaintiffs claim that prior to the establishment and working of said streets to their present grade their property, described and set out in their petition, was on a high and level elevation of considerable extent, and very desirable and valuable for residence purposes; that by reason of the grading complained of, deep cuts had been made along the south side of said block 12, and on the east and west sides thereof, and along the south and west sides of block 9, which rendered the whole of said property much less desirable than it was before, and caused the plaintiffs to be damaged in the amount of \$25,000, for which judgment was asked. The defendant admitted that it was a municipal corporation, and that the grades of Thirty-seventh and Thirty-eighth, and Leavenworth, and First and Second streets were established as plaintiffs alleged, but denied each and every other allegation of the petition, and denied that said property was damaged on account of said grading. The defendant furthermore claimed in its answer that plaintiffs' property was specially benefited and improved in a sum equal to, or in excess of, any damage sustained by the plaintiffs on account of the grading com-

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Kirkendall v. City of Omaha.

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plained of. The reply of the plaintiffs was in denial of each matter contained in the answer.

1. The first alleged error complained of arises in respect of the introduction of testimony of witnesses Robert Eason, Robert Nields, and D. V. Sholes. To Robert Eason was proposed the question following: "Q. If the grade had been left as it was before the city commenced grading in 1887, and Leavenworth street had been put to grade there on that basis, what would have been the effect on the market value of the property in general? In other words, was there anything that you know of to cause a depreciation in the market value of the property in question other than the grading of the streets in 1887 and 1888 by the city?" Accompanying this question was a tender of the evidence thereby sought to be elicited, in the following words: "That the only cause of the depreciation in the value of the property in controversy is the grading of the streets complained of, and that in the opinion of the witness there was no other ground for said depreciation." This witness was not required in the course of his evidence to give any estimate as to the value of the property affected, either before or after the grading complained of. The following testimony, however, had been elicited from him previous to the propounding of the question, upon the refusal to allow which error is predicated. This antecedent evidence was as follows:

Q. State what was the general effect of the grading of Leavenworth street as it was graded in 1887 and 1888, and also of the grading of Thirty-seventh and Thirty-eighth streets to conform to the grade of Leavenworth street, upon the market value of blocks 9 and 12, whether valuable or detrimental and injurious.

A. It was particularly detrimental and injurious to block 12. As to the value of the property on block 9, it did not affect it so materially,—only slightly in comparison with block 12.

Q. What would you say as to whether or not that detrimental effect would be of a large and serious character or not?

A. It would be of a large and serious character on block 12.

This evidence, received without objection, was of the same general tendency as was that sought to be elicited by the question as to which an objection was sustained. In the redirect examination of Mr. Coe, one of the plaintiffs, this testimony was given:

Q. Is there any element that you know of, from your experience and knowledge from real estate transactions and the situation of property, that prevented the advancement of your property like other property, other than the fact of this deep cut on Leavenworth street?

A. None that I know of.

The evidence of Nields and Sholes, which was rejected, was directed to the same proposition as was the rejected evidence of Robert Eason. In reference to the rejected evidence sought to be elicited from each of these witnesses, it may not be improper to observe that the same testimony was given by Mr. Coe as was sought to be introduced by the three witnesses named. This evidence was in no part of the record questioned or contradicted; neither was there any evidence contrary to, or in qualification of, that of Mr. Coe. The case was tried upon the theory that damages were properly shown by proving the value of the property before, as compared with its value after, the grading complained of. Possibly it might have been better to have qualified the question by limiting the valuation, under the conditions last referred to, to what it was as affected by the grading complained of; and yet, in effect, the same result was obtained by the general evidence given, as well as by the specific evidence, which has been referred to as having been elicited from Mr. Coe.

2. It is claimed there was error in refusing to allow the

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Kirkendall v. City of Omaha.

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plaintiffs to show by Euclid Martin "that the general tendency of other property in West Omaha, situated like the property in question was before the grading of the streets in question, has been on the increase; that the other property has increased largely in value during the period named in the question, and that such is not the fact respecting the property in controversy, and that to this day it is less in value than it was before the grading of those streets, and that the reason of it is the grading of the streets." It seems to us that this testimony, if not entirely speculative in its nature, was dangerously near the dividing line. The opinion of Mr. Martin as to why the general tendency of the property in question was different from that of other property in West Omaha, could have been nothing but mere speculation on his part; and equally removed must have been his opinion as to the grading of the streets being the sole obstacle to the advancement of this particular property as compared with other property in West Omaha.

3. Counsel for plaintiffs in error insist that the court should not have submitted to the jury the question of special benefits to the plaintiffs in error in respect of benefits of like nature with those which had accrued to owners of other property along and adjacent to Leavenworth street. It is argued that such benefits fall rather within the category of general benefits than special benefits. This construction treats the word "general" as synonymous with the word "common," as applied to a particular neighborhood. Such restrictive force does not of necessity inhere in the use of that word, for, as applied to benefits, they may be either common to the general public, or common to a mere neighborhood, or to a part of a street. The word "common" is ordinarily understood to apply to the general public when not qualified by some word or phrase of limitation. The term "general benefits," when unqualified, should probably be accepted in the same sense as the term "common benefits;" that is to say, when there is no limitation expressed,

it should be deemed applicable to the general public rather than as embracing as general but a limited part of the public. In some respects there obtains between the matter under consideration and the distinction held as to private nuisances a certain analogy, which can best be illustrated by reference to the case of *Francis v. Schoellkopf*, 53 N. Y., 152. This was an action for damages sustained by the plaintiff by reason of the noisome stench arising from the defendant's tannery, which rendered the enjoyment of plaintiff's dwelling uncomfortable and almost uninhabitable for herself and family, and prevented her renting another dwelling which she owned in that vicinity. It was objected by defendant's counsel that there could be no recovery in the case because the nuisance was public, and that the only remedy was by indictment. Grover, J., in delivering the opinion of the court, said: "The evidence showed that other houses in the vicinity were affected similar to those of the plaintiff. The ground of the motion [for a nonsuit] was, that as the stench injured a large number of houses, the nuisance was common, and therefore no one could maintain an action for his particular injury, the only remedy being an indictment for the common injury to the public. The error of this is obvious both upon principle and authority. The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrong-doer, and that if by the same act numbers are injured no recovery can be had by any one, is absurd."

The term "special benefits" implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public the owner of adjacent property is entitled to travel upon an improved highway, and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it

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Landauer v. Mack.

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is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by any one of the adjacent property owners, and by way of offset such increment should therefore be treated as a special benefit in favor of whomsoever it may arise. The theory followed by the court in the trial of the case, including the instructions to the jury, was correct. The judgment of the district court is

AFFIRMED.

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LANDAUER, KAIM & STRENG V. G. H. MACK &  
COMPANY.

FILED JANUARY 16, 1894. No. 4872.

1. **Fraudulent Conveyances: CHATTEL MORTGAGES: BURDEN OF PROOF: ATTACHMENT.** Where a creditor causes an attachment to be levied upon a stock of goods in the possession of the agent of certain mortgagees, the burden of proof is upon such creditor, on a motion to discharge the attachment, to show that the mortgages were made for the purpose of hindering, delaying, or defrauding creditors.
2. ———. The principles laid down in the first, third, and fifth paragraphs of the syllabus in *Jones v. Lorce*, 37 Neb., 816, approved, applied, and followed.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

The opinion contains a statement of the case.

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*Charles Offutt*, for plaintiffs in error:

All transactions between husband and wife are presumed to be fraudulent, and the burden is upon the wife to show by the clear and indisputable preponderance of the evidence the consideration for the claim which she makes against the estate of her husband when such claim is made as against the rights of creditors. (*Aultman v. Obermeyer*, 6 Neb., 265; *First Nat. Bank of Davenport v. Baker*, 57 Ia., 196.)

Mack had no right to make the claims of some creditors due in advance of the time agreed upon by the creditors, to the prejudice of those whose claims were due. (*Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800; *Smith v. Boyer*, 29 Neb., 76.)

A mortgage or deed to a *bona fide* creditor to secure the mortgagor's property against attachment by other creditors is made with intent to cheat, hinder, and delay, and is prohibited by law. (*Johnson v. Steele*, 23 Neb., 83; *Crowninshield v. Kittridge*, 48 Mass., 522; *Johnson v. Whitwell*, 24 Mass., 73; *Harris v. Sumner*, 19 Mass., 136; *Burlingame v. Bell*, 16 Mass., 324.)

When a debtor in failing circumstances executes a mortgage upon all of his property, and transfers thereby to the mortgagee property exceeding in value a sum sufficient to pay the mortgagee, the mortgage is fraudulent as to creditors. (*Morse v. Steinrod*, 29 Neb., 108; *Smith v. Boyer*, 29 Neb., 76; *Brown v. Work*, 30 Neb., 800; *Thompson v. Richardson Drug Co.*, 33 Neb., 715; *McCord v. Weil*, 33 Neb., 868.)

An assignment for the benefit of creditors may be made without following the form prescribed by statute. The transaction operated as, and was in legal effect, an assignment for the benefit of creditors. (*Bonns v. Carter*, 22 Neb., 518; *Morse v. Steinrod*, 29 Neb., 109; *Hershiser v. Higman*, 31 Neb., 531; *Preston v. Spalding*, 10 N. E. Rep.

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[Ill.], 903; *Richmond v. Mississippi Mills*, 11 S. W. Rep. [Ark.], 960; *Appeal of Miners Nat. Bank of Pottsville*, 57 Pa. St., 193; *Brashear v. West*, 7 Pet. [U. S.], 608; *Brown v. Minturn*, 2 Gallison [U. S.], 557; *Winner v. Hoyt*, 66 Wis., 234; *Norton v. Kearney*, 10 Wis., 443\*; *Gillmann v. Henry*, 53 Wis., 468; *Herbst v. Lowe*, 65 Wis., 316; *Backhaus v. Sleeper*, 66 Wis., 68; *Berry v. Cutts*, 42 Me., 445; *Burrows v. Lehndorff*, 8 Ia., 103; *Van Patten v. Burr*, 52 Ia., 518; *Wilson v. Richards*, 1 Neb., 343; *Omaha Book Co. v. Sutherland*, 10 Neb., 335; *McHugh v. Smiley*, 17 Neb., 629; *Rockwell v. Humphrey*, 57 Wis., 414; *White v. Colzhausen*, 129 U. S., 329.)

*Bartlett, Crane & Baldrige and E. R. Duffie, contra:*

Mack had the legal right to execute the mortgages, and there was no fraud in so doing. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Feder v. Solomon*, 26 Neb., 266; *Morrow v. Reed*, 30 Wis., 81; *Janvrin v. Fogg*, 49 N. H., 340; *Nash v. Norment*, 5 Mo. App., 545; *Seidentopf v. Annabil*, 6 Neb., 524; *People v. McAllister*, 19 Mich., 215; *Wyman v. Wilmarth*, 46 N. W. Rep. [S. Dak.], 190; *Britton v. Boyer*, 27 Neb., 522; *Davis v. Scott*, 27 Neb., 642.)

RYAN, C.

The questions arising in this case are solely incident to an attachment which issued out of the district court of Douglas county against the defendants G. H. Mack & Co., in a certain cause pending in that court, wherein Landauer, Kaim & Streng were plaintiffs. This attachment was levied upon a stock of merchandise which had previously, to-wit, on February 15, 1890, been mortgaged to the several parties hereinafter named, for the security of the payment of the amounts designated as owing to each, to-wit: To the First National Bank of Omaha, \$6,908.16; to Eliza-

beth Mack, wife of G. H. Mack, to secure the payment of \$5,939.16; to Sebastian Trottnner, to secure the payment of \$2,160; to Calixto Lopaz & Co., to secure the sum of \$1,290.28; to the firm of G. H. Mack & Co., of Cleveland, Ohio (the individual members of which were S. Trottnner and H. Lichtenberg of Cleveland, Ohio), to secure payment of the sum of \$2,912.56; to D. M. Steele & Co., to secure the payment of \$1,200; to Yokum Brothers, of Reading, Pa., to secure the payment of \$1,446.60; to Alvin McLeod, of Omaha, Nebraska, to secure the payment of \$200; to Meyer & Raapke, of Omaha, Nebraska, to secure payment of \$200. Subsequently to February 15, other mortgages, chattel and real, were given by the firm of G. H. Mack & Co., until the number of all was, in the aggregate, sixty. These mortgages, without question, covered all the property owned by the firm of G. H. Mack & Co., of Omaha, at the time the several mortgages were made. Anterior to the 15th day of February it is claimed, and for the purposes of this case it may be conceded, that G. H. Mack, a member of the firm of G. H. Mack & Co., withdrew from the assets of said firm such amounts of money as were out of proportion to his proper individual expenses, for which purpose he testified that the same were withdrawn.

From the testimony it is quite clear that the aggregate amount of the mortgages given on the 15th day of February, 1890, equaled or exceeded the value of the real and personal property mortgaged. It is an established fact upon the evidence that several of the mortgages given on February 15 were given to relatives of G. H. Mack. It is also true that the mortgages to Van Slyke and McLeod were given in excess of the amounts due each of these last two named parties, who were, at the time, employes of the firm of G. H. Mack & Co. These mortgages, given for more than the amounts actually due, seem to have been so given rather from mistake, or want of means of fixing the

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amount, than from any intention of giving any undue preference to the mortgagees named respectively.

It is insisted in argument that the fact that many of the mortgages given were to secure payment of sums not due at the date of the mortgages was evidence of bad faith on the part of the mortgagor and mortgagee. We should be loth to infer, as a necessary result from these premises, that such mortgages were fraudulent or invalid, or even that the fact that a mortgage was given for a debt not yet due was evidence of bad faith. Probably, as a matter of fact, mortgages are given oftener to secure sums not due than to secure the payment of claims which have already fully matured.

In respect to the fact that some of these mortgages were given to relatives of G. H. Mack, it is proper to observe that the testimony shows fully and clearly, so as to leave no ground for suspicion, that each relative who received a mortgage only received it for an amount which was actually due and for an indebtedness that was *bona fide* in all respects. Even had there been a mere question of fact in issue, there was as to this proposition testimony sufficient to sustain this affirmative finding of the court, and such finding would not, therefore, be disturbed. It is not necessary to resort to a mere presumption in favor of the correctness of the finding of fact in respect of this matter, for, upon an examination of all the testimony, we are satisfied that, as an original question, the weight of the evidence was with the finding made by the court, perhaps not expressly made, but such as must have incidentally been found to sustain the result reached. In a case like that at bar, where the mortgages have been made and recorded as required by law, and where the mortgagees have taken actual possession, which they are maintaining at the time of the levy of the attachment by a common agent of such mortgagees, the burden of proof devolves upon the attaching creditor to show that the mortgages were made for the purpose of

hindering, delaying, or defrauding creditors, a requirement not met by the proofs in this case. If one of the mortgages is *bona fide* and valid, and possession is held under such mortgage, no attachment could countervail the possession so held. If this was an action of replevin, it would be sufficient to show that the party in possession was in possession under one valid mortgage; and possession so held by the agent of a mortgagee must, as against one who undertakes to disturb that possession, prevail unless the attaching creditor shows that all the mortgages under which possession is held by the agent, are invalid.

A full examination of all the pleadings and evidence, upon which the motion to dissolve the attachment was heard, convinces us that the district court was right in sustaining the motion to dissolve the attachment, under the rules laid down in the case of *Jones v. Loree*, 37 Neb., 816, thus stated in the syllabus of said case:

"1. Where several chattel mortgages are executed simultaneously for the purpose of securing debts owing by the mortgagor to the mortgagees, the aggregate of such indebtedness not being unreasonably less than the value of the property mortgaged, such mortgages will not be held void merely because no one of such debts is in itself sufficient to justify so great a security."

"5. An intention to defraud cannot be inferred merely from the fact that a preference was given to a certain creditor."

The argument of plaintiffs in error seems to be based largely upon the theory that the several mortgages in fact constituted an assignment by the firm of G. H. Mack & Co. contrary to the terms of the assignment law of this state. It is true that in *Bonns v. Carter*, 20 Neb., 566, language was employed by a portion of this court which would seem to justify this contention of the plaintiffs in error. It is quite clear that the provisions of the assignment law should not be made to operate more

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broadly than its terms express; in other words, its operation should not be extended by implication. The assignment law prohibited assignments made in any other manner than that fixed by its terms, but did not undertake to abrogate the provisions of section 20, chapter 32, Compiled Statutes of Nebraska. The language of this section is as follows: "The question of fraudulent intent in all cases arising under the provisions of this chapter, shall be deemed a question of fact and not of law," etc. The repeal of a statute by implication is not favored, and certainly the force given the assignment law by a portion of this court in *Bonns v. Carter, supra*, necessarily has this operation. Whether an assignment is made in conformity with the provisions of the assignment law, may be properly a question for the court to determine upon its construction of the instrument or instruments creating the assignment. It nevertheless remains true, that whether mortgages or conveyances are fraudulent, is a question of fact to be determined by the jury, or, in cases tried like the one at bar, by the court, solely upon the weight of the evidence adduced. Such questions are questions of fact involving largely the intention of the parties to the transaction, and should not be determined as questions of law arising under the assignment act. The ruling of the district court was correct, and its judgment is

AFFIRMED.

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SAMUEL G. OWEN, APPELLEE, V. DELOS A. UDALL  
ET AL., APPELLANTS.

FILED JANUARY 16, 1894. No. 4350.

1. **Principal and Surety: RELEASE OF SURETY.** Where a surety signs an obligation upon the condition that another person named shall also sign said obligation as surety before the first

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of such signers shall be held liable thereon, the condition named must be known to the obligee to render it effective as against him.

2. **Partnership: LIABILITY AS SURETY.** A partnership firm is not liable as a mere surety upon contracts foreign to the purposes for which the partnership was entered into by the partners. This rule, however, does not necessarily relieve from liability a partnership firm, which, for the purpose of subserving its own interests, has become surety for the performance by a principal contractor of his several undertakings, and which, solely by reason of its said relationship, has secured to itself advantages of a substantial character.

3. **Res Adjudicata.** A decree in favor of a firm of subcontractors, establishing its right to a mechanic's lien and the enforcement thereof as against real property improved by the contribution of such subcontractor firm, cannot properly be invoked as *res adjudicata*, or by way of estoppel in any other respect as against the owner of the property improved when he brings suit for the recovery of damages upon a contract signed, with others, by said subcontractor firm as surety, even though the gravamen of such suit is, in part, the repayment of the amount which, on account of said decree, the aforesaid owner has been compelled to pay to such subcontractor firm.

APPEAL and error from the district court of Lancaster county. Heard below before FIELD, J.

The facts are stated in the opinion.

*Charles E. Magoon*, for appellants and plaintiffs in error:

A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances. (Brandt, Suretyship & Guaranty, sec. 79; *Law v. East India Co.*, 4 Ves. [Eng.], 824; *Lang v. Pike*, 27 O. St., 498; *Kingsbury v. Westfall*, 61 N. Y., 356; *Ludlow v. Simond*, 2 Caines' Cases [N. Y.], 1; *Wins'on v. Fenwick*, 4 Stew. & P. [Ala.], 269;

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*Harrison v. Field*, 2 Wash. [Va.], 136; *Pickersgill v. Lahens*, 15 Wall. [U. S.], 140; *Pecker v. Julius*, 2 Browne [Pa.], 31; *Van Derveer v. Wright*, 6 Barb. [N. Y.], 547; *Viele v. Hoag*, 24 Vt., 46; *Heath v. Derry Bank*, 44 N. H., 174; *Baker v. Briggs*, 8 Pick. [Mass.], 122; *Rogers v. Trustees of Schools*, 46 Ill., 428; *Judah v. Zimmerman*, 22 Ind., 389; *Grant v. Smith*, 46 N. Y., 93; *Ryan v. Trustees of Shawneetown*, 14 Ill., 20; *Miller v. Stewart*, 9 Wheat. [U. S.], 702.)

If the surety signs the obligation upon the condition that another shall also sign it as surety before it shall be binding on him, and this condition is agreed to by the creditor, or is known to him when he takes the obligation, the surety is not generally liable unless the condition is complied with. (Brandt, Suretyship & Guaranty, sec. 349; *Crawford v. Foster*, 6 Ga., 202; *United States v. Hammond*, 4 Biss. [U. S.], 283; *King v. Smith*, 2 Leigh [Va.], 157; *Miller v. Stem*, 12 Pa. St., 383; *Smith v. Doak*, 3 Tex., 216; *Jordan v. Loftin*, 13 Ala., 547; *Cowan v. Baird*, 77 N. Car., 201; *Clements v. Cassilly*, 4 La. Ann., 380; *Hill v. Sweetser*, 5 N. H., 168; *Read v. McLemore*, 34 Miss., 110; *Dunn v. Smith*, 12 Smed. & M. [Miss.], 602; *Goff v. Bankston*, 35 Miss., 518; *Bivins v. Helsley*, 4 Met. [Ky.], 78; *Evans v. Bremridge*, 8 De Gex [Eng.], 100; *Coffman v. Wilson*, 2 Met. [Ky.], 542; *Corporation of Huron v. Armstrong*, 27 Up. Can., Q. B., 533; *Pawling v. United States*, 4 Cranch [U. S.], 219; *Cutler v. Roberts*, 7 Neb., 4; *Gregory v. Littlejohn*, 25 Neb., 368.)

One partner cannot by his individual act bind the firm as the guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety for another, without authority specially given him for the purpose, or implied from the common course of business of the firm, or from the previous course of dealings between the parties, unless the act of such partner be afterwards ratified by the others. He who seeks to hold the firm has

the burden of proving authority, consent, or ratification. (Lindley, Partnership, p. 138\*, note 21, *Sweetser v. French*, 2 Cush. [Mass.], 309; *Rollins v. Stevens*, 31 Me., 454; *Bank of Rochester v. Bowen*, 7 Wend. [N. Y.], 158; *Mayberry v. Bainton*, 2 Harr. [Del.], 24; *Maudlin v. Branch Bank at Mobile*, 2 Ala., 502; *Selden v. Bank of Commerce*, 3 Minn., 108; *Hamill v. Purvis*, 2 Pen. & W. [Pa.], 177; *Sutton v. Irwine*, 12 S. & R. [Pa.], 13; *McQuewans v. Hamlin*, 35 Pa. St., 517; *Schermerhorn v. Schermerhorn*, 1 Wend. [N. Y.], 119; *Davis v. Blackwell*, 5 Ill. App., 32; *Rolston v. Click*, 1 Stewart [Ala.], 526; *Foot v. Sabin*, 19 Johns. [N. Y.], 154; *Boyd v. Plumb*, 7 Wend. [N. Y.], 309; *Langan v. Hewett*, 13 Smed. & M. [Miss.], 122; *Andrews v. Planters Bank of Mississippi*, 7 Smed. & M. [Miss.], 192; *Moran v. Prather*, 23 Wall. [U. S.], 492; *Duncan v. Lowndes*, 3 Campb. [Eng.], 478; Lindley, Partnership, sec. 143.)

A point once adjudicated by a court of competent jurisdiction may be relied upon as an estoppel in any subsequent collateral suit, in the same or any other court at law or in chancery, or in admiralty when either party or the privies of either party allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action. (Wells, *Res Adjudicata*, sec. 24; *Hackworth v. Zollars*, 30 Ia., 433; *Hites v. Irvine's Adm'r*, 13 O. St., 283; *Gray v. Dougherty*, 25 Cal., 266; *Covington & Cincinnati Bridge Co. v. Sargent*, 27 O. St., 237; *Kelly v. Donlin*, 70 Ill., 385.)

*Stearns & Strode, contra:*

One who signs a bond as surety and delivers it to another to obtain the signature of a third person before delivering it to the obligee, constitutes the person to whom he delivers it his agent, and is liable on the bond though it is delivered without the signature of the third person. (*Gibbs v. Johnson*, 30 N. W. Rep. [Mich.], 343.)

A partner exceeding his authority in making a contract is personally liable on it. (2 Lawson, Rights, Rem. & Pr., sec. 645; *Skinner v. Dayton*, 10 Am. Dec. [N. Y.], 286.)

A bond, which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should be signed by other persons, who did not sign the same, if it appear that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, provided he has been induced upon the faith of such bond to act to his own prejudice. (*Cutler v. Roberts*, 7 Neb., 12.)

A partner entering into a contract in the name of the firm is estopped to deny his authority. (2 Lawson, Rights, Rem. & Pr., sec. 645; *Trustees of Presbyterian Congregation in Salem v. Williams*, 9 Wend. [N. Y.], 147; *Mann v. Aetna Ins. Co.*, 40 Wis., 552; *Porter v. Curry*, 50 Ill., 319; *Dudley v. Littlefield*, 21 Me., 418.)

The bondsmen are liable. (*Kiewit v. Carter*, 25 Neb., 460.)

#### RYAN, C.

1. The appellee Samuel G. Owen entered into a written contract with the appellant Delos A. Udall, whereby Udall agreed to erect a certain building for Owen in consideration of the payment to him of \$6,200. In this contract Udall was principal, and the defendants McClay, McCall, and the Chicago Lumber Company were sureties. Collateral to this contract a bond was given for the proper performance of its undertakings, which bond was also signed by Udall as principal, and the same parties as sureties who signed the original contract in that capacity. No complaint is made as to the proper construction of the build-

ing. Its cost, however, was greater than was contemplated, and the proprietor was therefore obliged to pay off \$1,501.43, the aggregate amount of certain mechanics' liens against the property improved. This suit was on the contract and bond for the amount so paid out, and for damages, which, the appellee claimed, aggregated the sum of \$2,347.33. He also stated that, as the building was not completed until sixty days after the time specified in the contract, he had thereby suffered damages in the sum of \$600. Udall, in his answer, pleaded a settlement and full payment, which plea was also made by McClay and McCall. The two latter named parties also alleged that at the time they signed the agreement and bond it was expressly agreed that H. P. Foster was to sign with them as surety; that Foster did not sign said bond, but that the same was signed by the Chicago Lumber Company, a co-partnership firm, and that the name of the Chicago Lumber Company was signed thereto without authority, and, therefore, is not binding on the said firm; that the Chicago Lumber Company filed a mechanic's lien on said premises and foreclosed the same in the district court of Lancaster county; in a suit wherein the said lumber company was impleaded with the appellee Owen and other defendants, and that judgment was obtained in said suit by the lumber company against Owen, and that Owen paid said judgment, whereby he is estopped from recovering from the defendants the amount of said lien. They also filed a denial of all the allegations of the petition not expressly admitted. The lumber company filed an answer containing the same matters of defense as those pleaded by McCall and McClay, and in addition alleged want of authority for the signing of its name to the agreement and bond sued upon. These allegations were denied by a reply. A reference of these issues was stipulated by the parties, and thereupon ordered by the court. The referee found as facts that the building contemplated by the agreement and bond was to have been

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finished on or before November 15, 1885, and that in fact it was not finished for two months thereafter; and, although the agreement provided for the payment of a penalty at the rate of \$10 per day for the time covered by such failure, the referee found that Owen was damaged only to the extent of \$100, for which judgment was recommended. This finding was supported by the evidence, and was in no sense a penalty, and therefore not open to objection on that score.

2. The referee further found that both the contract and bond "were signed in the presence of one John J. Kouhn by defendants Sam McClay and F. McCall, who said they would each sign, provided defendant H. P. Foster also signed said instruments, and they entrusted said instruments to the said John J. Kouhn, who took them to the defendant H. P. Foster, who signed the name of the defendant, the Chicago Lumber Company, thereto, with the express provision in each instrument, 'provided they furnish the material,' as a condition of liability, which material the said company, so far as they could, did furnish; that said Chicago Lumber Company was and is a copartnership, composed of M. T. Green, of Chicago, and defendant H. P. Foster, managing partner, at Lincoln, Nebraska; that the signing of the name of the Chicago Lumber Company to said instruments was in express violation of the partnership agreement between the said Foster and his partner, Green, and was so expressed by said Foster to said Kouhn; that the plaintiff (Owen) never had any knowledge of the want of authority by said Foster to sign the name of the Chicago Lumber Company to said instruments, but, on the contrary, that plaintiff believed he had authority, and relied upon the signature and instruments as authorized and valid, and relied thereon and acted thereon as if the same were wholly valid and authorized, and in ignorance of the real facts; that neither of defendants McClay nor McCall brought to the knowledge of plaintiff at any time that their signing

was not in good faith and without condition until some time after the buildings were completed, and that the plaintiff relied on the signatures of defendants McClay and McCall, as made in said instruments, as made in good faith and without condition violated or restricted except as by the terms of said agreement." With reference to this finding of fact the referee stated his conclusion of law thus: "I find further that the defendant Chicago Lumber Company is estopped to deny the authority of defendant Foster to sign the obligations herein litigated, having received, in due course of business, benefits therefrom, and that the signing of said obligations was a wrongful act of said Foster as against the defendant Chicago Lumber Company, and that defendant Chicago Lumber Company is entitled to a surety judgment against the defendant H. P. Foster for all sums it shall be compelled to pay in this action."

It is without the possibility of question on the evidence that the Chicago Lumber Company furnished all the lumber that was used in the building, which was the subject-matter of the contract and bond. Within its line of business the Chicago Lumber Company could furnish no other material; hence, the condition upon which the signature of the lumber company was affixed to the agreement and bond was fully met in the transactions wherein the lumber company was concerned. Its relation, therefore, to the bond was not that of a mere surety.

In the case of *Mann v. Aetna Ins. Co.*, 40 Wis., 549, the liability of the firm of Mann Brothers upon bonds was under consideration. Lyon, J., delivering the opinion of the court, used the following language: "The bonds do not seem to have been executed individually by but one of the firm of Mann Brothers, but only in the name of the firm. Whatever objection might have been made by the partners not executing the bonds in their individual capacity, to the form of execution, in case the action were against them on the bonds, there is no doubt of the right of the firm, in

whose name and for whose benefit they were executed, to treat them as valid and binding obligations against it. And the firm did so by paying the judgment recovered against Aldrich, Smith & Co. in the Milwaukee county court. Moreover, the firm having received the consideration for which the bonds were given, will not be heard to deny their validity. For these reasons, we think, the objection to the validity of the bonds because of the fact that each member of the firm did not execute them individually, is not available to the defendant."

In *Porter v. Curry*, 50 Ill., 319, it was held that "If the purchase of property by one copartner was not within the scope or usage of the partnership, yet if the property was in fact purchased on the firm credit, and the other partner afterwards claimed and obtained possession of it as firm property on that ground, the latter thereby ratified the act of his copartner, and cannot claim the benefits of the purchase and deny its obligations."

In the case at bar, one of the partners affixed the signature of the Chicago Lumber Company to the bond, as surety, it is true, and yet that relationship was predicated upon a condition profitable to the lumber company. This condition was that certain benefits should accrue to the lumber company by virtue of its relation to the contracts in question. The lumber company received the benefits stipulated for, as a condition for its becoming surety for the performance by Udall of his undertakings. Having received these benefits, it does not now occupy the relation of a mere surety to said contracts. It has become bound as fully as though no inhibition upon its powers was contained in the partnership articles adopted between Green and Foster, the individuals who constitute the firm known as the Chicago Lumber Company. The referee, therefore, was right in concluding that the lumber company was held as surety upon the contract and bond, notwithstanding the inhibition against its sustaining that relation contained in its partnership articles.

3. It is insisted on behalf of McClay and McCall that the building erected was a much more expensive building than was contemplated by the contract and bond, and that the plans and specifications, with reference to which said contract and bond were made, were radically departed from in the construction of the building, as to the erection of which they had become sureties. As to whether or not these objections were well founded, we are without sufficient data to form an opinion. The specifications do not seem to have been used in evidence, and as they were the only reliable data from which we could determine whether there has been a departure or not, we must assume, in the absence of a showing to the contrary, that there was no such departure as would release the sureties from their undertaking.

4. Again, it is urged by the sureties, McCall and McClay, that their signatures were attached to the contract as well as to the bond, upon the condition that the signature of H. P. Foster should afterwards be attached to the same instruments. The language in which this defense was attempted to be pleaded by the answer of these parties is as follows: "These defendants further say that they signed said contract as sureties only, and that they signed the same with the express understanding and agreement with the plaintiff that the said contract should be of no binding force until the same had been signed in addition to themselves by ———, and that the same was never signed by said parties." In this part of the answer, which is the only one upon the subject under discussion, there was the absence of a very material element, to-wit, the name of the party whose signature was to be obtained in addition to the signatures affixed by McCall and McClay respectively. It is very doubtful whether any finding could supply this deficiency. Should it be conceded, however, that under the proofs we should be justified in assuming that H. P. Foster's name was one to be inserted

in the blank, there would arise another difficulty in respect to the contention of these sureties, and that is, that neither the contract nor bond contained any intimation of such a condition as is now urged in respect to the signature of Foster. The evidence which would logically be necessary to sustain the averments in this respect, construed as liberally as may be, would relate to matters resting in parol previous to the signing by McClay and McCall. The contention urged is, that in addition to the signatures of these parties there should afterwards be obtained the signature of another party, or the signatures of the two parties named would not have any binding force. The condition that the contract and bond should be operative only upon their being signed by Foster, could be made available only by showing that it was assented to by the obligee; or, at least, that he approved of the signatures of McClay and McCall upon the condition named. The evidence upon this point is conflicting, and the finding of the referee is adverse to such condition being known to Owen at the time he received the contract and bond as fully executed, and that Owen never knew of any claim of such condition until the cause of action sued on had almost, if not entirely, accrued in his favor. There is, however, another consideration which militates very strongly against the claim made for the release of the sureties McCall and McClay, and that is, that as a matter of fact the signature of the Chicago Lumber Company affixed by H. P. Foster necessarily rendered him liable, as found by the referee, to the same extent as he would have been liable had he signed his own proper name instead of that of the Chicago Lumber Company. In view of all these considerations, the defendants McCall and McClay should not be heard to assert this defense.

5. As to the matter of settlement, the evidence was conflicting; on the one hand, it being insisted that the settlement referred to embraced simply extras which are not

sued for in this action; on the other hand, the contention was that the settlement was of all matters in dispute. In support of the first, the testimony of Owen was direct and circumstantial; and against it was the testimony of Udall with equal certainty. The referee, however, found the facts consistently with the evidence given by Owen, and, therefore, said finding will not be disturbed.

6. The sureties, McClay and McCall, insisted that they should be released from liability, because they notified Owen not to make payments to Udall, and because Owen made payments without insisting upon there being furnished him a statement from the clerk of the office wherein liens are recorded that such clerk had formally examined the records and found no liens or claims recorded against the work or on account of said contract; and that said Owen, although he had knowledge of the existence of other claims, voluntarily, and against the express protests of said sureties, made payments to Udall of large sums of money on account of his contract. An examination of the record furnishes no evidence in support of these affirmative allegations, and upon this subject the findings of the referee are silent. The payments seem to have been made, so far as the evidence shows, in accordance with the terms of the contract as to the performance of the conditions of which the said McClay and McCall were sureties.

7. It is insisted by the defendants sustaining the relation of sureties to the contract and bond sued upon that Owen is estopped to claim payment of the amounts by him paid to the Chicago Lumber Company upon its enforcement of the mechanic's lien for material furnished for the erection of the building, as to the construction of which the contract and bond were made. This claim is founded upon the fact that anterior to the commencement of this suit there was filed by J. R. Megahan, and another, petitions for the foreclosure of mechanics' liens against the said building, on account of labor done in the erection of the same.

To this suit the Chicago Lumber Company and Samuel G. Owen were made defendants. The Chicago Lumber Company, by answer in the nature of a cross-petition, set forth its claim for the enforcement of a mechanic's lien against the same premises. Samuel G. Owen answered this cross-petition of the Chicago Lumber Company in general denial. A decree was afterwards rendered establishing the liens of the several claimants therefor in that suit. It is insisted that, as between Owen and the Chicago Lumber Company, that decree settled for all purposes the claim of the Chicago Lumber Company adversely to Owen, and from thenceforward he was estopped to afterwards set up that claim as the foundation on his own behalf for a recovery upon the contract and bond sued on herein.

The said contract and bond, it will be observed, created between Owen and Udall the relation of owner of the property to be improved and principal contractor. Whoever else contributed any lumber, material, or labor for the erection of the building contracted for, did so as subcontractor. The action of each of these subcontractors for the enforcement of his lien was necessarily against Owen as owner of the property to be improved, against Udall as principal contractor, and against other parties claiming liens. By no stretch of legal proprieties could McClay, McCall, or the Chicago Lumber Company, as sureties upon the contract and bond sued on herein, be brought in as parties to the foreclosure of the liens of such subcontractors. In a suit by such subcontractors the only matter which could be litigated was the liability of the property for the payment of such amount as such subcontractors had furnished for its betterment. Between the owner and the subcontractors there is not necessarily any direct contract relation. The liability is only that of the property for the payment of such an amount as the contribution of such subcontractors should render it liable to. Under these circumstances it is difficult to conceive how any judgment

rendered in favor of a subcontractor could be an adjudication of the rights of Owen to sue McClay, McCall, and the Chicago Lumber Company, as sureties, for the non-performance by Udall, their principal, of conditions which they had agreed to be bound that he should perform. It is true that the decree was in favor of the Chicago Lumber Company and against Owen as one of the defendants; and yet that decree was only to the extent that certain property was held liable for the payment for certain materials used in its improvement. The contract and bond signed by the Chicago Lumber Company did not stipulate that the Chicago Lumber Company would file no lien for material furnished; indeed, the provision that the material should be furnished by that company would seem to imply rather the contrary. As no condition contained in the contract or bond signed by the Chicago Lumber Company afforded any ground for pleading a defense against the claim of the Chicago Lumber Company to a lien, it necessarily resulted that no estoppel could be predicated upon the failure of Owen to plead such matter; neither did the decree in favor of the Chicago Lumber Company, as against Owen, amount to an adjudication as to the matters which are in dispute in this action. The judgment of the district court is

AFFIRMED.

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**OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY  
v. GEORGE E. BRADY.**

FILED JANUARY 16, 1894. No. 4437.

1. **Railroad Companies: STREET CROSSINGS: NEGLIGENCE.** By the statute, railroad companies are given the right to lay their tracks in and across the streets of the municipalities of this state; and this right carries with it the corresponding duty on

39	27
39	408
39	614
39	27
41	173
41	805
39	27
44	192
44	860
39	27
46	916
39	27
47	669

their part to construct and maintain at all times proper crossings on the streets intersected at grade by their main and side tracks, and neglect so to do would be evidence of negligence which would render the railroad company liable for an injury occurring by reason thereof.

2. ———: NEGLIGENCE: FLAGMAN: QUESTION FOR JURY. In the absence of a municipal ordinance and of express statutory requirements on the subject, whether a railroad company is guilty of negligence in not maintaining a flagman, or some other equally safe and efficacious instrumentality at a given street crossing, is a question of fact for the jury to determine from the circumstances and evidence in the particular case.
3. ———: NOISE FROM MANAGEMENT OF TRAIN: EVIDENCE OF NEGLIGENCE. Railroads cannot be operated without noise; and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise; and whether the noise complained of resulted from a prudent operation of the railroad or its appliances, is a question to be determined from the circumstances and other evidence in the case. That the noise complained of was unnecessarily made, is not of itself evidence that its making was negligence. To be evidence of negligence the noise must have been made under such circumstances and surroundings as to time, place, and the situation of the parties, as to show a neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances.
4. Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting and where different minds might reasonably draw different inferences as to these questions from the facts established. *American Water-Works Co. v. Dougherty*, 37 Neb., 373, followed.
5. The opinion of a medical expert may be based (1) on his acquaintance with the party whose condition is under investigation; (2) upon a medical examination of him which he has made; or (3) upon a hypothetical case stated to the expert in court.
6. Examination of Medical Experts: HYPOTHETICAL QUESTIONS. Some latitude must necessarily be given in an examination of medical experts and in the propounding of hypothetical questions, the better to enable the jury to pass upon the question submitted to them. It is the privilege of counsel in such cases

to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed.

7. The argument of counsel to the jury should be limited to the facts in evidence and the reasonable inferences deducible therefrom. Counsel charged with the responsibility of the conduct of a case has certain rights as well as duties in the premises. He must use all honorable means to protect his client's interests. He must act honorably and fairly with the court, opposing counsel and the jury; but he may of right in his argument make such comment on the conduct and credibility of witnesses or parties to the suit as the evidence warrants.
8. In order to constitute champerty the contract between the attorney and his client must not only provide that the attorney shall have a part of the money or thing recovered in the action, but it must also provide that the attorney shall at his own expense support the suit, be responsible for the costs, and take all the risks of the litigation.
9. Champerty. A railroad company sued for damages, alleged to have been sustained by plaintiff through its negligence, cannot interpose as a defense that the suit is being carried on by virtue of a champertous agreement between plaintiff and his counsel; this is a defense available only, if at all, to the plaintiff in a suit against him on the contract.
10. Negligence: INSTRUCTIONS. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper for a trial court to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence. At most, the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 235 followed.
11. Railroad Companies: NEGLIGENCE: PERSONAL INJURIES: EVIDENCE: DAMAGES. June 27, 1888, Brady was injured through the negligence of the railroad company. No bones were broken and no injury was visible. He was not confined to his bed until July 1889, and in the meantime worked at hauling brick and dirt and indulged some in athletic sports. In the summer of 1889 he was seriously sick with inflammation of the lining membrane of the chest. In March, 1890, he sued the railroad company for damages, alleging that the injury of June 27, 1888, was permanent. At the time of the trial he was suffering from

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a mortal disease, probably consumption. The jury found his condition at the time of the trial was the result of the injury he received June 27, 1888. *Held*, That for this verdict to stand it must have for support competent evidence that Brady's condition at the time of the trial was the probable and reasonable result of the injury received June 27, 1888, and that evidence that his present condition was possibly the result of said injury, was not sufficient.

ERROR from the district court of Madison county. Tried below before POWERS, J.

The opinion contains a statement of the case.

*J. M. Thurston, W. R. Kelly, and E. P. Smith*, for plaintiff in error:

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (*Schofield v. Chicago & St. P. R. Co.*, 114 U. S., 618; *Parks v. Ross*, 11 How. [U. S.], 372; *Richardson v. Boston*, 19 How. [U. S.], 269; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Furlong v. Garrett*, 44 Wis., 111; *Jones v. Chicago & N. W. R. Co.*, 49 Wis., 352; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis., 216; *Atchison & N. R. Co. v. Loree*, 4 Neb., 446; *State Bank of Crete v. Smith*, 29 Neb., 434.)

There is no statute requiring a flagman, and the judiciary cannot establish police regulations on their own judgment where the legislature has apparently considered none essential. (*Hass v. Grand Rapids & I. R. Co.*, 47 Mich., 401; *Peck v. Michigan C. R. Co.*, 19 Am. & Eng. R. Cases [Mich.], 257.)

Slight want of ordinary care on plaintiff's part will defeat his recovery, however gross the defendant's negligence may have been, provided it was not willful and malicious.

Under the testimony the court should have directed a verdict for the defendant. (*Randall v. Northwestern Telegraph Co.*, 54 Wis., 142; Beach, Contributory Negligence, sec. 162; *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. Cases [Ind.], 248; *McQuillikin v. Central Pac. R. Co.*, 2 Pac. Rep. [Cal.], 46; *Kelly v. Pennsylvania R. Co.*, 8 Atl. Rep. [Pa.], 856; *Dunning v. Bond*, 38 Fed. Rep., 813; *Freeman v. Duluth, S. S. & A. R. Co.*, 41 N. W. Rep. [Mich.], 875; *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cases [N. Car.], 386; *Salter v. Utica & B. R. Co.*, 75 N. Y., 273; *Weyl v. Chicago, M. & St. P. R. Co.*, 40 Minn., 353; *Rhoades v. Chicago & G. T. R. Co.*, 58 Mich., 266; *Thompson v. New York C. & H. R. R. Co.*, 33 Hun [N. Y.], 16; *Heffinger v. Minneapolis, L. & M. R. Co.*, 45 N. W. Rep. [Minn.], 1131.) It is negligence to unnecessarily drive horses known to be easily frightened in the vicinity of trains emitting steam and making the usual noise incident to their operation. (*Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St., 306; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St., 219; *Cosgrove v. New York C. & H. R. R. Co.*, 6 Am. & Eng. R. Cases [N. Y.], 35; *Rhoades v. Chicago & G. T. R. Co.*, 25 N. W. Rep. [Mich.], 182; *Campbell v. New York C. & H. R. R. Co.*, 51 Hun [N. Y.], 642; *Stringer v. Frost*, 19 N. E. Rep. [Ind.], 331.)

The book should have been admitted in evidence. (*Van Every v. Fitzgerald*, 21 Neb., 41; *Schuyler Nat. Bank v. Bollong*, 24 Neb., 823; *Field v. Farrington*, 10 Wall. [U. S.], 141; *Xenia Bank v. Stewart*, 114 U. S., 230; *Randall v. Northwestern Telegraph Co.*, 54 Wis., 143; *Smith v. Schulenberg*, 34 Wis., 41.)

The jury should in every case distinctly understand what are the exact facts upon which experts base their opinions. The admission of testimony founded partially upon their memory of plaintiff's evidence was erroneous. (*Luning v. State*, 2 Pinney [Wis.], 215; *Bennett v. State*, 57 Wis., 83;

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*Hunt v. Lowell Gas Light Co.*, 8 Allen [Mass.], 169; *Kempsey v. McGinniss*, 21 Mich., 123; *Woodbury v. Obear*, 7 Gray [Mass.], 467; *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis., 164; *Heald v. Thing*, 45 Me., 392; *Cincinnati & Firemen's Mutual Ins. Co. v. May*, 20 O., 224; *O'Leary v. Iskey*, 12 Neb., 136; *Morrill v. Tegarden*, 19 Neb., 536.)

The verdict should be set aside on account of remarks, unsustained by any testimony, made by the plaintiff's attorneys in addressing the jury, and calculated and intended to affect the verdict. (*Brown v. Swineford*, 44 Wis., 292; *Tucker v. Henniker*, 41 N. H., 317; *State v. Smith*, 75 N. Car., 306; *Ferguson v. State*, 49 Ind., 33; *Hennies v. Vogel*, 7 Cent. L. J. [Ill.], 18; *Coble v. Coble*, 79 N. Car., 589; *Long v. State*, 56 Ind., 186; *Rudolph v. Landwerlen*, 92 Ind., 34; *Hall v. Wolf*, 61 Ia., 559; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Ia., 130; *Baker v. Madison*, 62 Wis., 137; *Hanawalt v. State*, 64 Wis., 84; *Sasse v. State*, 68 Wis., 530; *Commonwealth v. Scott*, 123 Mass., 239; *Hatch v. State*, 8 Tex. App., 416; *Chicago & A. R. Co. v. Bragonier*, 13 Brad. [Ill.], 467; *Rickabus v. Gott*, 51 Mich., 227; *Bedford v. Penny*, 25 N. W. Rep. [Mich.], 381; *People v. Quick*, 25 N. W. Rep. [Mich.], 302; *Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Bradshaw v. State*, 19 Neb., 644; *Jacques v. Bridgeport Horse R. Co.*, 41 Conn., 61; *Galveston, Harrisburg & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cases [Tex.], 470; *Galveston, H. & H. R. Co. v. Cooper*, 70 Tex., 67; *McCormick v. Chicago, R. I. & P. R. Co.*, 47 Ia., 345; *Moore v. State*, 17 O. St., 526; *Baker v. City of Madison*, 62 Wis., 147; *State v. Balch*, 31 Kan., 465; *Bremer v. Green Bay R. Co.*, 61 Wis., 114; *Henry v. Sioux City & P. R. Co.*, 66 Ia., 52; *Bullis v. Drake*, 20 Neb., 167; *Bullard v. Boston & M. R. Co.*, 5 Atl. Rep. [N. H.], 838; *Dougherty v. Welch*, 53 Conn., 558; *Kreuzinger v. Chicago & N. W. R. Co.*, 73 Wis., 162; *Pennsylvania R. Co. v. Roy*, 102 U. S., 451.)

The agreement between the plaintiff and his counsel for payment by the former to the latter of one-half of the judgment as compensation is champertous and contrary to public policy. Any agreement to pay part of the sum recovered, whether by commission or otherwise, on consideration either of money advanced to maintain a suit, or services rendered, or information given, or evidence furnished, comes within the definition of champerty. (2 Parsons, Contracts [5th ed.], 766; *Stanley v. Jones*, 7 Bing. [Eng.], 369\*; *Thurston v. Percival*, 1 Pick. [Mass.], 415; *Boardman v. Thompson*, 25 Ia., 487; *Cord v. Southwell*, 15 Wis., 231.)

When it appears from the evidence that a suit is prosecuted under a champertous agreement the court should at once dismiss it. (*Barker v. Barker*, 14 Wis., 154; *Webb v. Armstrong*, 5 Humph. [Tenn.], 379; *Morrison v. Deadrick*, 10 Humph. [Tenn.], 342; *Hunt v. Lyle*, 8 Yerg. [Tenn.], 142.)

There was no proof that the damage, past or prospective, was the probable result of the accident, but only the possible result. This will not do. There must be facts laid before the jury from which they may say, not that it is the possible, but the probable result. (*White v. Milwaukee City R. Co.*, 61 Wis., 536; *Abbot v. Tolliver*, 71 Wis., 64; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 305; *Gibbons v. Wisconsin V. R. Co.*, 58 Wis., 341.)

*Wigton & Whitham, contra:*

The court did not err in overruling the motion to instruct the jury, at the close of plaintiff's testimony, to find for defendant. This the court may do only when plaintiff has failed to introduce evidence tending to sustain each material allegation of his petition; and, in determining whether plaintiff has so failed, let us remember, as this court has repeatedly held, that "by the interposition of the motion the defendant admitted not only the truth of the evidence,

but the existence of all the facts which the evidence conduces to prove as well as inferences to be drawn from it. The only question is whether all the material facts alleged in the petition have been supported by some evidence, however slight. It matters not how slight this evidence may have been, if any was produced the motion should have been overruled, because it is the right of a party to have the weight and sufficiency of his testimony passed upon by the jury." Plaintiff not only produced some evidence, but established, beyond question, that defendant was negligent in not keeping in good repair good and sufficient crossings. That the letting off of steam without warning was the direct cause of plaintiff's team taking fright and running is positively sworn to. The questions of negligence and contributory negligence were for the jury. (*Smith v. Sioux City & P. R. Co.*, 15 Neb., 586; *Johnson v. Missouri P. R. Co.*, 18 Neb., 696; *Byrd v. Blessing*, 11 O. St., 362; 1 Thompson, Negligence, p. 24; *Hart v. Chicago, R. I. & P. R. Co.*, 9 N. W. Rep. [Ia.], 116; *Hart v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 347; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St., 259; *Gordon v. Boston & M. R. Co.*, 53 N. H., 396; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill., 298; *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B. [Eng.], 53; *Culp v. Atchison & N. R. Co.* 17 Kan., 475; *Andrews v. Mason City & Ft. D. R. Co.*, 42 N. W. Rep. [Ia.], 42; *Walker v. Boston & M. R. Co.*, 13 Atl. Rep. [N. H.], 649; *City of Plattsmouth v. Mitchell*, 20 Neb., 231; *Stringer v. Frost*, 19 N. E. Rep. [Ind.], 331; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 336.)

The ruling upon the objections to the testimony of the experts was without error. (*Hunt v. Lowell Gas Light Co.*, 8 Allen [Mass.], 169; *Wright v. Hardy*, 22 Wis., 348; *Getchell v. Hill*, 21 Minn., 464; *Negroes v. Townshend*, 9 Md., 445; *Gates v. Fleischer*, 30 N. W. Rep. [Wis.], 674.)

In the argument of a cause error will lie only from the action of the court, and not from the language of counsel.

(*Bradshaw v. State*, 17 Neb., 152; *McLain v. State*, 18 Neb., 163; *Bohanan v. State*, 18 Neb., 79; *Bullis v. Drake*, 20 Neb., 172.)

The agreement between the plaintiff below and his attorneys is valid and not champertous. (*Blaisdell v. Ahern*, 11 N. E. Rep. [Mass.], 681; *Courtright v. Burnes*, 13 Fed. Rep., 323, note; *Phillips v. South Park Com'rs*, 10 N. E. Rep. [Ill.], 230; *Winslow v. Central I. R. Co.*, 32 N. W. Rep. [Ia.], 330; *Aultman v. Waddle*, 19 Pac. Rep. [Kan.], 730.) Even if it were champertous, the defendant, not being a party to the contract, and this not being an action on the contract, could not raise the question or be relieved of any liability in this action because of it. (*Courtright v. Burnes*, 13 Fed. Rep., 317; *Gage v. Downey*, 19 Pac. Rep. [Cal.], 120.)

RAGAN, C.

George E. Brady sued the Omaha & Republican Valley Railroad Company in the district court of Madison county for damages, for an injury which he alleges he received by reason of the railroad company's negligence on the 27th day of June, 1888, while he was in the act of crossing the railroad company's tracks in the city of Norfolk with his wagon and team. He alleged in his petition that at the time of his injury Norfolk avenue ran east and west through, and was the principal street in, said city, and that the railroad company's main and side tracks crossed said avenue at grade in a northeasterly and southwesterly direction. The grounds of negligence charged against the railroad company, are three: (a.) That the railroad company had caused the crossings at the intersection of said avenue and said main and side tracks to become and remain out of repair by removing the planking from between the rails of said tracks at said crossings. (b.) That the railroad company had no flagman or other person at said crossing to give warning. (c.) That plaintiff was engaged in hauling

dirt with his team of horses and wagon upon said avenue, and while so engaged in driving his said team and wagon along and upon said avenue going west, when about to cross said railroad and side tracks upon said avenue, the railroad company, by its servants and agents, negligently, wrongfully, and unlawfully, suddenly and without warning to plaintiff, caused and permitted steam to discharge in great volume, noise, and with hissing sound while said engine was standing or moving slowly on defendant's said railroad near the north margin of said avenue and public road and near the plaintiff's said team, which took fright thereat, ran away, across and over said railroad and side tracks, and the dirt bed or plank floor of said wagon, upon which plaintiff was riding, became loose and fell to the ground, and plaintiff was struck and thrown by reason thereof from and off of said wagon down under the same and was run over by said wagon and the wheels thereof. The defense of the railroad company—aside from admitting its corporate character, location of Norfolk avenue, and its intersection by the main and side tracks of the railroad—was substantially a general denial of the averments of the petition and a plea of contributory negligence upon the part of Brady. Brady had a verdict and judgment, and the railroad company brings the case here for review, assigning numerous errors, of which we notice eight.

1. That the evidence does not establish any negligence on the part of the railroad company which caused Brady's injury.

(a.) The condition of the crossing. The evidence discloses that the railroad company's track and side tracks cross Norfolk avenue as alleged in the petition; that said avenue was one of, if not the main thoroughfare of said city; that it was much used both by the country people and the residents of the city; that some time prior to Brady's accident the railroad company had removed the

planking, or a part of it, from between the rails of their tracks at said crossings, and at the date of the casualty the said crossings were not in good condition; that Brady, on the day of his injury, was engaged in hauling dirt from a point west of these crossings and passed over them with his wagon; that while he was driving west for a load of dirt, sitting on the dirt boards of his wagon, and while about to pass over the crossing of Norfolk avenue and the main track, his horses became frightened at the noise made by escaping steam from the locomotive engine of the railroad company on said main track, ran away and over the crossings of the said tracks; the chucking and striking of the wheels of his wagon against and between said tracks loosened the boards on his wagon, causing an end of one of them to fall to the ground and the other end to strike Brady on his side and to knock him off his wagon, one wheel of which passed over his body. It does not clearly appear whether his hurt was caused by being struck by the board or by the wagon wheel passing over him. I am not aware of any statute in this state which expressly provides that railroad companies shall construct and maintain in good order street crossings at the grade intersections of their railroad and side tracks with the streets of the cities of this state; but railroad companies are by the statutes given the right to lay their tracks in and across the streets of the municipalities of the state, and this right carries with it the corresponding duty on the part of the railroad companies to construct and maintain at all times proper crossings on the streets intersected at grade by their tracks and side tracks; and if an injury is caused by reason of their neglect to do either, they are liable therefor. (2 Wood, Railway Law, p. 958; *Worster v. Forty-second Street & G. S. F. R. Co.*, 50 N. Y., 203.) There is sufficient competent evidence in the record to sustain the jury's verdict to the extent that Brady was injured through the negligence of the railroad company in failing to keep in

good repair the crossings at the intersection of the railroad and side tracks with Norfolk avenue.

(b.) The flagman at crossings. The evidence on the trial was conflicting as to whether there was a flagman at the crossing at the time of the accident. For the purposes of this opinion we shall assume there was none. There is no statute in this state which expressly makes it the duty of a railroad company to keep a flagman at the crossings of city streets, nor is there anything in the record showing that such duty was enjoined on the railroad company by the ordinances of the city of Norfolk. No rule can be laid down by the courts in such matters that might not work injustice. It certainly is not the duty of railroad companies to maintain a flagman or watchman or gates at all crossings of all streets; and on the other hand it is their duty to so use their property and franchises as not to unnecessarily injure others. In the absence of a city ordinance and all statutory requirements on the subject, whether a railroad company is guilty of negligence in not maintaining a flagman or some other equally safe and efficacious instrumentality at a particular street crossing, is a question of fact for the jury or trial court to determine from all the circumstances of the particular case; and while there is no doubt it was the duty of the railroad company to maintain a flagman or some other equally safe instrumentality at this crossing to warn persons about to come on said crossing of approaching danger, yet the neglect of this duty by the railroad company in this instance neither produced nor contributed to Brady's injury; and if this verdict depended for its support on such default, it could not stand. The noise of escaping steam which frightened Brady's horses was produced by the engineer opening the cylinder cocks of his engine, at that time north of the avenue and not approaching or about to approach the avenue, but backing or about to back away from the crossing. Counsel for Brady argue, if we understand them, that the railroad company

should have, by a flagman, or otherwise, at the crossing, given notice to Brady that this noise was about to be made, and that the failure of the railroad company to do so was evidence of negligence to go to the jury. The duty of a flagman or watchman at a street crossing is, as we understand it, to warn persons about to go on the crossing of approaching trains, cars, or engines, i. e., danger. How could a flagman at this crossing have known that this engineer was about to open the valves of his engine? And a rule of law that made it evidence of negligence against a railroad company for it not to apprise persons about to come on the crossing that an engine or other machinery on the track was about to cause a noise, usual and incident in the operation of said railroad, would be both unjust and oppressive. We are aware that such a rule was laid down by the supreme court of Iowa in *Hart v. Chicago, R. I. & P. R. Co.*, 56 Ia., 166; but with the highest respect for that tribunal, we cannot follow its conclusions in that case on this point.

(c.) The escape of steam. It appears from the evidence that while Brady's team was on or nearly over the crossing of the main track, a locomotive engine headed south on said main track some fifty feet north of Brady's team was either backing slowly or about to back away from the crossing, and while the team and engine were in this situation, the engineer permitted the steam to escape from the cylinder cocks of his engine, the noise of which frightened Brady's team and caused it to run away; that the noise made was not extremely loud, nor was it an unusual, hideous, or frightful one; that the engine had been taken a short time before from the roundhouse, where it had stood the previous night; that the employes of the railroad company had been doing some switching with it in making up a train that was about to go out, and at the time of the "letting off steam" the engine and train were backing or about to back up to the station; that as an engine cools

down the steam condenses in the cylinders, and it is necessary for the protection of the engine to force the water formed by this condensation out of the cylinders before sending the engine out on the road; that this is done by opening the valves in the cylinder; that from the time the engine came out of its stall to the moment of the accident, sufficient time had elapsed for ejecting the condensed steam from the cylinders; that the act of "letting off steam" at the time it was done was not necessary for the proper operation or protection of the engine; that the train had just backed over the crossing from a point south of the avenue; that this avenue was much traveled, and others besides Brady with teams were on it, but not in the immediate vicinity of the crossing at the time the train backed over it. That the engineer, when he passed the crossing, observed Brady or others on the street and near the crossing, and that at the time he opened the valves of his engine he was aware of Brady's presence on or near the crossing, are not established by the testimony. These facts were competent evidence to go to the jury, as they were part of the things done; but they were not, under all the facts and circumstances in this case, evidence that the act of unnecessarily "letting off steam" was a negligent one. If the record disclosed that the engineer in charge of the train, at the time he opened the valves of his engine, was aware of the presence of Brady, or other persons with teams, at the crossing, then these facts would have been evidence of negligence for a jury's consideration. If the facts, circumstances, and situation of the parties had been such at the time this steam escaped as to make it the duty of the engineer to be aware of Brady's presence, then the engineer's act of opening the valves would have been evidence of negligence for the jury's consideration. The evidence does not show that the engineer, at the time, was aware of Brady's presence, but that immediately prior to the escaping of this steam the engine had been backing

north towards and across Norfolk avenue. During this time it was the duty of the engineer to keep a lookout in the direction towards which his engine was moving. When his engine passed the Norfolk avenue crossing Brady was a hundred feet away, and the engineer was under no obligations to observe him or his conduct at that distance. If at the time the engine passed the crossing at Norfolk avenue, Brady and his team had been in the immediate vicinity of the crossing, the facts might have been competent for the jury. At the very moment the engineer permitted the escaping of the steam his engine was either moving, or about to move, north away from the crossing, and in either case it was the engineer's duty to be then on the lookout for obstructions on the track in the direction his engine was moving or about to move; and if he was not so engaged, that fact would be evidence of negligence. Suppose at the time the steam escaped, the engineer had been looking toward the crossing he had just passed, and his train had struck and injured a child on the track. Could this company escape liability therefor by saying that the engineer did not see the child in time to stop his train because at the moment of the accident he was looking back toward the point from which his train was receding? We think no lawyer will contend that the railroad company could escape liability on any such grounds. Railroads cannot be operated without noise, and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise. The making of an unnecessary noise by a railroad company, as, in this case, the escaping of steam, is not of itself evidence of negligence. It may or may not be. To be negligence, the noise must have been made under such circumstances and surroundings as to time, place, and situation of the parties as to establish a neglect to exercise that degree of care which a reasonable man would have exercised

under the circumstances. If this verdict depended for its support on the alleged negligence of the railroad company's engineer in opening the valves of the engine and unnecessarily permitting the escape of the steam therefrom, it could not stand; but the verdict does not rest alone on such alleged act of negligence; and the instruction of the district court by which the jury was permitted to consider the unnecessary escape of steam, and the noise made thereby, as evidence of negligence, though erroneous, was without prejudice to the railroad company, as the proximate cause of Brady's injury, as proved, was the bad condition of the railroad and switch-track crossings of Norfolk avenue; and there is ample evidence to sustain the jury's finding that Brady was injured by the negligence of the railroad company, after excluding all the evidence on the subject of escaping steam.

2. That Brady's injury was the result of his contributory negligence.

The evidence shows that Brady knew the planks had been removed from between the rails and that the crossings were out of repair; that his horses would become frightened if it, the railroad company, "let off steam;" that he saw ahead of him the train backing slowly north across the avenue on which he was driving, while he was 100 feet from the crossing; that he took no special precautions for his safety when approaching the crossing, but sat on the boards on his wagon, with his feet hanging at the side and holding his lines as he ordinarily did when approaching a crossing. In *Foxworthy v. City of Hastings*, 23 Neb., 777, it is said that negligence is doing something which a prudent man under the circumstances would not do. Now, did Brady, in driving on this crossing at the time, in view of the situation of the engine, his knowledge of the disposition of his team, and the condition of the crossings, do something which a prudent and reasonable man would not have done? Different minds might honestly answer the

question differently, and the question is therefore one for the jury. (*City of Lincoln v. Gillilan*, 18 Neb., 114; *Orleans v. Perry*, 24 Neb., 831; *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

3. That the court erred in overruling objections made to hypothetical questions propounded to experts by Brady's counsel.

Brady brought this suit some twenty months after he was hurt. During the summer of 1889 he was sick and attended by the physicians examined as experts, and was also examined at the trial by the physicians in the presence of the jury; and it appears from the evidence that Brady was then afflicted with a mortal disease, probably consumption. Dr. Hagey, one of the physicians, after testifying that he visited Brady professionally in the summer of 1889 and had heard his evidence, was asked by Brady's counsel this question: "Q. State whether the condition in which you found him at that time—summer of 1889—might be the result of an injury received in June, 1888." Counsel for the railroad company interposed to this question the following: "Objected to by the defendant, as improper, as it is founded partially upon the memory of the witness as to what testimony was given by the plaintiff to the jury." The trial court overruled the objection and the railroad company excepted. Dr. Salter, one of the physicians who had attended Brady during his sickness in 1889, and examined him at the trial, was asked by Brady's counsel this question: "Q. Now, you may state whether, in your judgment, his present condition may be the result of an injury which the plaintiff received as testified to by him on June 27, 1888, taking into account his entire testimony as to his physical condition since that time, providing such testimony and providing such facts as are testified to by him are true." To this there was the same objection, same ruling of the trial court and exception taken by the railroad company.

It will be observed that the objection is "that the witnesses remembered only part of Brady's evidence." We have no means of knowing how this was. The record is silent on the subject. The expert was not examined, before answering, by objecting counsel as to how much of Brady's evidence he had heard or remembered. The objection itself was not on its face a valid one. The opinion of a medical expert may be based (1) on his acquaintance with the party who is under investigation; (2) on a medical examination of him which he has made; (3) and upon a hypothetical case stated to the expert in court. (Lawson, *Expert and Opinion Evidence*, 144.) "Some latitude must necessarily be given in the examination of medical experts and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his questions assumes them to be, the opinion may have some weight, otherwise not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." (*Filer v. New York C. R. Co.*, 49 N. Y., 42.) In *Wright v. Hardy*, 22 Wis., 348, the following hypothetical question was approved: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper?" In *Hunt v. Lowell Gas Light Co.*, 8 Allen [Mass.], 169, this hypothetical question was approved: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" Also in *Getchell v. Hill*, 21 Minn., 464, this hypothetical question was approved: "Supposing all these facts you have heard testified to are

true, what is your opinion?" The hypothetical questions objected to were not very happily framed. They called for the opinions of experts as to possibilities instead of probabilities; but they were not objected to on that ground, and the court did not err in overruling the objections made.

4. That the court erred in refusing to admit in evidence a memorandum book.

Brady testified that from the time of the runaway until the time of the trial he had never been a well man and had done no labor of any consequence. A witness for the railroad company, one Gerecke, the manager of a brick and tile company in Norfolk, testified that from August 20, 1888, to October of the same year, and in April and June of 1889, Brady was engaged in hauling brick from the yard of Gerecke. Witness kept a memorandum book in which he entered Brady's name at the time he received brick and the number of loads hauled. Brady also signed his name in this book as a receipt for the brick received. The exclusion of this book was not prejudicial error. The question at issue was not whether Brady signed his name in this book, but whether he hauled and handled the brick. The book was not the best evidence to prove the fact of Brady's performing labor. That was proved by Gerecke and others, who testified that they saw him loading and hauling brick, and their statements were the best evidence of the facts sought to be proved.

5. That the court erred in ruling that certain statements made by Brady's counsel in his argument were proper deductions from the evidence.

The statement of counsel was as follows: "I say with their wealth and their influence which they possess, and I say that with Ransom and the balance of them looking up and searching for evidence that they have brought against us, that their agents themselves knew they were swearing to a state of facts that never could have existed, never did exist, and could not well have existed." Upon objection

made by counsel for the railroad company to these remarks the trial court said: "I think the gentleman has a right to draw his own conclusions from the evidence." To this ruling of the court counsel for the railroad company took exception. The question is, was this statement a fair deduction or conclusion from the evidence; or, was it so unwarranted by anything in the testimony as to be prejudicial error, and was the trial court wrong in holding that the evidence in the case warranted counsel's conclusions?

The witness Ransom testified that he was in the employ of the railroad company; that his business was to look up evidence for the company in cases like the one on trial; that he spent half his time at this business; and that part of his visits to Norfolk had been for the purpose of looking up evidence in the case on trial.

Joe Flynn, another witness for the railroad company, said his occupation was anything he could get to do; that he had been figuring around at a little of everything the past season; that he could not say he was in the employ of the railroad company; "the way, my understanding is this: Of course I went around, and what time I used for them they agreed to pay me my wages. Of course, I was under no written agreement of employment or anything of the kind. \* \* \* If I happened to meet any one I would go around with him to Mr. Ransom." \* \* \*

Q. They agreed to pay you for whatever you did for them?

A. I will answer it just as I understood it. I was not in their employ at all. If I was under any expense or lost any of my time they were to pay me for it. There was nothing said about my coming to work for them or about being in their employ at all, but in case that I lost a day in running around they were willing to pay me for it. I was not in their employ for any certain time.

Q. Did they not agree to give you \$50 for your work in that case? (*Clarke v. Railroad Co.*, tried just before this.)

A. While they did not agree to do it, but my fees and expenses amounted to that; that was what my fees and expenses amounted to.

Q. Is it not true, Joe, that you are now working for them in the same way; that is, in this case?

A. There has nothing been said about it at all.

Q. Not at all?

A. No, sir.

Q. Is it not true that you have been detailed to get their witnesses for them and to talk with them?

A. Yes, sir; I have talked with them.

Q. Is it not true that you have been assisting Mr. Weatherby and the others in getting witnesses for this trial?

A. I cannot say particularly.

Q. Well, you expect to be paid for your work?

A. I do not know that I have done any work.

Q. You expect to get paid for your work, what you have done?

A. I have got my fees.

Q. You have got your fees; you have got your pay?

A. Yes, sir; I demanded them as I went.

We are very clear that counsel's remarks were warranted by the evidence, and that the court was not in error in his ruling. The argument of counsel in addressing the jury should be limited to the facts in evidence and to the fair inferences to be drawn therefrom, and counsel should be allowed in his argument to draw all reasonable and fair deductions from the evidence. A lawyer charged with the responsibility of the conduct of a case has certain rights as well as duties in the premises. On the one hand he must use all honorable means to protect his client's interests. He must act honorably and fairly with the court, opposing counsel, and the jury; but he should not be restrained in his argument from making such comment on the conduct and credibility of witnesses or parties to the suit as is justified by the evidence.

6. That this suit is prosecuted under a champertous agreement between Brady and his counsel, and that the court erred in not so holding and dismissing the suit. The contract referred to is as follows: "It is hereby agreed by and between Geo. E. Brady and Wigton & Whitham that said Wigton & Whitham act as attorneys for said Geo. E. Brady, and shall do and perform such legal work and services as shall be necessary and proper in the prosecution and collection of a claim of said Geo. E. Brady against the Omaha & Republican Valley Railway Company for personal injuries received by said Brady on or about June 27, 1888; and in consideration of said agreement on the part of Wigton & Whitham, said Brady agrees to give the management and trial of the case about to be begun for the collection of said claim to the said Wigton & Whitham as his attorneys, and to pay an amount equal to one-half of the amount recovered from said company, either by compromise or judgment."

The text writers are not entirely agreed in their definitions of the term "champerty." Lord Coke defines the term thus: "To maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit." (Coke's Litt., 368b.) Sergeant Hawkins defines the term thus: "The unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it." (1 Hawkins, P. C. [6th ed.], 645.) Mr. Chitty defines it thus: "Champerty is the purchasing a suit or right of action of another person; or rather, it is a bargain with a plaintiff or defendant, to divide the land or other matter sued for, between them, if they prevail at law; whereupon the champertee is to carry on the party's suit at his own expense." (2 Chit., Cont. [11th Am. ed.], 996.) Mr. Blackstone defines it thus: "A bargain with the plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law; whereupon the cham-

pertor is to carry on the party's suit at his own expense." (4 Bl. Com., 135.)

Champerty is not a criminal offense, nor is a champertous contract illegal under our statutes; and if this contract is champertous and voidable, it is because it is contrary to public policy to enforce it. Adopting the definition of champerty given by Mr. Blackstone, and interpreted in the light and language of that definition, is this contract champertous? It will be observed that one of the essential elements of the vice of champerty is that the champertor must carry on the litigation at his own expense. There is no such provision in the contract assailed here as champertous. Another element of the vice of champerty, as defined above, is that the agreement must provide for the division of the subject-matter of the suit, if successful, between the parties to the champertous agreement. This element is also lacking in the contract under consideration. The language is: "To pay an amount equal to one-half of the amount recovered." It is not stipulated that Brady's counsel shall have any certain part of the sum recovered, but their compensation, if they are successful, is to be measured by the amount of the recovery.

The courts are not in complete harmony as to what contracts are champertous. The weight of authority seems to be that contracts between attorney and client by which the attorney agrees, in consideration of having a part of the thing recovered, to support the litigation at his own expense are champertous; but where the attorney does not undertake to support the litigation at his own expense, but simply agrees to render the ordinary services of an attorney in consideration of receiving a part of the thing recovered, then the agreement is not champertous. In *Blaisdell v. Ahern*, 144 Mass., 393, the contract provided: "Said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered in the case, \* \* \* and the counsel so employed shall, in

view of the uncertainty of the result in their payment, be entitled to very large and liberal fees, in no event to exceed fifty per cent of the amount collected by them." The client was to pay all costs. In an action by the attorney against the client to recover for his services the court held that the contract under which services were rendered was not void for champerty. In *Aultman v. Waddle*, 40 Kan., 195, certain judgment creditors assigned judgments which they owned to an attorney, agreeing with him that he should collect the judgments in his own name and retain fifty per cent of the amount realized for his fees, the creditors to pay all costs. The court held that the agreement was not champertous, as it did not relieve the creditors from paying the costs of the proceedings. To the same effect are also the following: *Wright v. Tebbitts*, 91 U. S., 252; *Winslow v. Central Iowa R. Co.*, 71 Ia., 197; *Phillips v. South Park Commissioners*, 119 Ill., 626.

From these authorities we conclude that in order to taint a contract with the vice of champerty, the agreement between the attorney and the client must provide not only that the attorney shall have a part of the money or thing recovered, but that he must also at his own expense support and carry on the suit and take all the risks of the litigation. The contract between Brady and his counsel is not within this rule, and therefore not champertous. It remains to be said on this point, however, that if this contract were champertous, that fact would not be a defense of which the railroad company could avail itself in this case. That would be a defense, if a defense, available only to Brady in a suit against him on the contract. (*Aultman v. Waddle*, 40 Kan., 195; *Courtright v. Burnes*, 13 Fed. Rep., 317.)

7. That the court erred in refusing to charge the jury as follows:

"1. Every person of ordinary intelligence is bound to know that a railroad crossing over a public highway, where

cars are frequently passing, is a place of more than ordinary danger; and the law requires that they must exercise prudence, care, and caution to avoid any accident or collision therefrom; that in approaching such crossings it is their duty to both listen and to look for approaching trains. If plaintiff saw defendant's cars moving slowly over the crossing in time to have stopped his team until there should be no danger of frightening his horses from the noise or escaping steam of the cars, it was his duty to do so; and if, with plaintiff's knowledge, his horses, or either of them, were liable to be startled or become unmanageable on account of such noise or steam, then it would be negligence on his part to attempt to drive them across the track before the moving cars had reached such a distance that no danger therefrom could reasonably be apprehended.

"2. The principle that requires that a man shall use his ears and eyes for his precaution in approaching a railroad crossing equally requires that he shall use his faculties in the management of his team and thus keep out of danger. If you shall find from the evidence that the horses driven by plaintiff were, of his own knowledge, easily frightened by a locomotive or by the operation of cars, and that they were liable, if he attempted to cross the track, to be frightened or startled by the defendant's cars situate as they were, he did so at his own risk. The act becomes one of negligence, and he cannot recover. It makes no difference in such cases whether or not there was a flagman stationed at the crossing, because the only duty of a flagman is to give notice of the situation of the train. The plaintiff could see that for himself, and he had no right to rush into danger.

"3. If you shall find from the evidence that the plaintiff knew the position of the railroad track, the crossing and its condition, if it were out of order, and that trains were running frequently thereon; approached the crossing with full knowledge that the train was moving over the same, as shown by the testimony, but without stopping his team

until they had come so close upon the tracks that he was unable to stop them before getting upon the tracks, and, in consequence thereof, they ran away and he was injured, the plaintiff cannot recover in this action.

"4. If you shall find from the evidence that the plaintiff could have seen and did see the approaching train by looking in the direction of it before he reached the crossing, in time to have stopped his horses and avoided their being frightened by the operation of the locomotive, and omitted so to do, such omission was negligence, and you should find for the defendant; especially is this the case if you shall find from the evidence that the horses, or either of them, were easily frightened and had been frightened and run away at the same crossing prior to the accident, and that to the knowledge of the plaintiff."

These instructions were properly refused, for the reason that they in effect said to the jury that if Brady did thus and so, or if he omitted to do thus and so, then he was guilty of negligence. The court could tell the jury that an act or omission was or was not evidence for their consideration in determining whether Brady was guilty of negligence; but whether the evidence established negligence or no negligence was and is exclusively for the jury. *Orleans Village v. Perry*, 24 Neb., 831, was an action for damages resulting from a fall into an excavation in a sidewalk. The evidence showed that the plaintiff knew of the excavation; that he attempted to pass that way, and, remembering the defect, made an effort to pass around it; but by reason of misjudging the distance, he fell into the excavation and was injured. It was held that the question of his contributory negligence was for the jury to decide in view of the circumstances as shown by the evidence. In *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395, the defendants, who owned some hay about a mile from the plaintiff's stacks, in order to protect them from prairie fires, burned the stubble around them. The fire escaped and burned plaintiff's hay.

There had been fires raging in the vicinity for days, and plaintiff saw the fire which escaped from defendant's stack more than twenty-four hours before it reached his hay. He apprehended danger, but he did not burn nor mow the stubble around his stacks but attempted to haul his hay away. The court held that the question whether plaintiff used reasonable care to protect his hay was for the jury, and that it was error to charge that his failure to remove the stubble was not negligence. In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, Commissioner RYAN, speaking to this point and for this court, said: "It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most, the jury should duly be instructed that such circumstances \* \* \* are properly to be considered in determining the existence of negligence." In *American Water-Works Co. v. Dougherty*, 37 Neb., 373, IRVINE, C., speaking to this point and for this court, used this language: "Issues as to the existence of negligence and contributory negligence \* \* \* are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established."

8. That the damages awarded Brady by the jury are excessive.

The verdict in this case was for \$7,000. Without a doubt it is predicated on the finding of the jury that Brady had sustained a permanent injury. The trial of this cause occurred on the 1st day of May, 1890. At this time Brady's right lung, or the major portion of it, was, to use the language of the physician who testified in the case, "completely dead;" and it is evident from the record that Brady was extremely feeble and slowly dying, probably of consumption. Other than this no disability is shown. Whether this verdict is excessive must then be determined

by an answer to this question: "Was Brady's condition at the time of the trial the result of the hurt received June 27, 1888?" The jury evidently found that it was. It remains, then, to ascertain whether such finding is supported by competent evidence. Brady's evidence and that of the members of his family and his other witnesses was to the effect that when his team ran away he was struck on the side by a dump board, or part of one, and knocked off his wagon, one of its wheels running over his body; that prior to that time he was a sound, healthy man; that he had never been well since; had suffered more or less since with a pain in his side, bowels, and breast; and had since done no work of any consequence, and since the accident had been unable to work. On the other hand, the evidence is to the effect that Brady, from the date of the accident until July, 1889, continued his usual labor; that he worked at loading and hauling brick; hauling dirt for building a dike; that he participated in athletic sports, such as wrestling and handling dumb bells; that in July, 1889, he had a serious sickness; that he then complained of pain in his chest and bowels; that his disease was pleuritic—inflammation of the lining membrane of the chest; that Brady's family then claimed in his presence that his pleuritic trouble began in April, 1889, and that it was caused by Brady's throwing lead bricks; and this statement was not contradicted by any one.

For the purpose of showing that Brady's condition at the time of the trial was the result of his hurt in June, 1888, his counsel called Doctors Hagey, Tashjean, and Salter. Dr. Tashjean had examined Brady immediately after the runaway, and both he and Dr. Hagey had attended him during his illness in the summer of 1889; Dr. Salter had been treating Brady since February, 1890, and with the other two doctors had examined him at the trial. The following is the substance of their evidence to the point under consideration:

Q. State whether the condition in which you found him at the time (July, 1889) might be the result of an injury such as he testified he received in June, 1888.

A. It is possible. I do not say that it was. It is possible to have been from an injury such as he stated he had.

Q. Now you may state whether in your judgment his present condition may be the result of an injury which the plaintiff received, such as testified to by him, on June 27, 1888, taking into account his entire testimony as to his physical condition from that time until this, providing such testimony and such facts as testified to by him are true.

A. Am I to take into consideration the fact that he says that he did not work and the fact the other witnesses say that he did work? The difficulty that I see with the question is that there has been some evidence that he did work since that time, and he says that he did not work to any amount.

Q. No, sir; do not take that into consideration.

A. Then I say that it is possible.

Q. Would you say, in your judgment, that his condition, when you saw him in August, 1889, might be the result of an injury received on the side by something striking the side, or from a fall received about a year previous to that time?

A. It might be, but I do not say that it was.

Q. His condition at the time might be the result of such an injury?

A. I cannot say; it might be.

Q. State whether, in your judgment, his present condition, or the condition you saw him in a few weeks ago, might be the result of an injury received in the side in June, 1888.

A. Why, it might be.

Q. Now then, doctor, providing this patient of yours, Mr. Brady, had continually labored at his usual vocation as a laboring man for three or four years after the acci-

dent occurred in June, 1888, for a number of months, say five or six or seven months almost continually, would you from your diagnosis of the case at that time, in August or July, 1889, say that his condition at that time could result from an accident received in June, 1888?

A. I cannot say. It might be, but I do not know.

Q. From your observation at the time of the examination in July or August, 1889, your first examination after the accident, could you discover any necessary relation between the two?

A. Why, I could not say.

Q. You could not see any necessary connection?

A. I could not conscientiously say what the cause was. I had not the observation to make the connection between 1888 and 1889. Had I had charge of the case right along, I could have told something; but I do not know.

No witness in this case testified that Brady's condition at the time of trial, or his illness in 1889, was the result of the hurt he received in June, 1888. No witness even ventured such an opinion. Brady's own physicians shield themselves behind possibilities and refuse to say that his present condition is even probably the result of his injury in June, 1888. The jury then must have reached their conclusion by inference. In *Fry v. Dubuque & S. W. R. Co.*, 45 Ia., 416, the evidence was that the injured limb was in a fair way to recover permanently after the first injury, and the witness would not say there was no chance for a permanent recovery. The court charged the jury: "You will give her such damages as will fairly compensate her for all past, present, or future physical suffering or anguish which is, has been, or may be caused by said injury." The supreme court, on appeal, held this construction to be erroneous, and laid down the rule as follows: "While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of,

and should not be left to mere conjecture." In *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 305, the rule is thus laid down: "To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating the damages, and may not be proved." In *Ohio & M. R. Co. v. Cosby*, 107 Ind., 32, it is said: "That an injury may possibly result in permanent disability, will not warrant the assessment of damages for a possible disability unless it is also reasonably certain to follow. That in order to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of." In *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill., 391, the rule is thus stated: "Where speculation or conjecture has to be resorted to, for the purpose of determining whether the injury results from the wrongful act or from some other cause, damages cannot be allowed for such injury." In *Filer v. New York C. R. Co.*, 49 N. Y., 42, it is said: "The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury." In *White v. Milwaukee City R. Co.*, 61 Wis., 536, the rule is thus stated: "To justify the jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability is reasonably certain to result from the injury complained of." To the same effect are *Curtis v. Rochester & S. R. Co.*, 18 N. Y., 534; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S., 249; *City of Chicago v. Langlass*, 52 Ill., 256; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. [N. Y.], 425; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill., 538; *Baltimore City P. R. Co. v. Kemp*, 61 Md., 74.

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Omaha & R. V. R. Co. v. Brady.

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This is a very unusual case. Here was a man hurt in June, 1888, by being struck on the side by a board falling from a wagon or by one of its wheels passing over his body. No bones are broken; no injury is visible; he is, to quote his own testimony, up and around, driving his horses and hauling brick until July, 1889; at this time he has pleuritic trouble—typhoid. May 1st, his disease, whatever it is, and however caused, is incurable; he is dying, and the jury say as the result of his injury in 1888. Guided by the authorities quoted above, for this verdict to stand it must have for support competent evidence that establishes that Brady's present condition is probably and reasonably the result of the accident of June, 1888. That Brady was well before June, 1888; that he has never been well since, and is now dying, is not enough in this case to authorize the jury to infer that this accident caused his present disability. That physicians say his present condition is possibly the result of an injury received in June, 1888, is not competent evidence to support such a finding. If this verdict was much larger than it is, and if it had for support evidence showing that Brady's condition was probably and reasonably the result of the accident sustained, we would not, because of its amount, disturb it; but we are constrained to say that this verdict, in so far as it awards Brady damages for a permanent injury, is not supported by competent evidence. The judgment of the district court must, therefore, be reversed and the case remanded for a new trial, unless counsel for Brady shall, within twenty days, file with the clerk of this court a remittitur of \$5,000 from the judgment rendered herein; and in case of their compliance with this order, the judgment of the district court for \$2,000, with seven per cent interest thereon from May 3, 1890, and costs of suit, will be affirmed; and it is so ordered.

JUDGMENT ACCORDINGLY.

IRVINE, C.: I concur in the foregoing opinion throughout, except that I think the instructions submitting to the jury the questions as to escaping steam were, under the evidence, prejudicially erroneous, and that the judgment of reversal should therefore be absolute.

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LAWRENCE C. ENEWOLD V. FERDINAND OLSEN.

FILED JANUARY 16, 1894. No. 5385.

1. **Parties: NAMES.** In law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the Code of Civil Procedure.
2. **Summons: NAME OF DEFENDANT: JURISDICTION.** The law requires that a defendant shall be sued by his true name, if the same is known or can be ascertained by the party suing him; and, under section 69 of the Code of Civil Procedure, a court obtains no jurisdiction over the person of a defendant served with summons by leaving a copy thereof at his usual place of residence, unless such defendant is designated by his true name, except in cases brought under section 23 of the Code of Civil Procedure.
3. **Parties: NAMES: SUMMONS: RETURN: JUDGMENTS.** Under section 148 of the Code of Civil Procedure, if a defendant is sued by any name and description other than his true name, except in actions brought under section 23 of the Code of Civil Procedure, a court acquires no jurisdiction over him by the sheriff leaving a copy of the summons at such defendant's usual place of residence. Accordingly, where E. sued "F. Olsen, full name unknown," the sheriff returned that he served the summons on "F. Olsen, full name unknown," by leaving a copy thereof at his usual place of residence. The court defaulted "F. Olsen, full name unknown," and rendered a personal judgment against him. In proceedings by E. against Ferdinand Olsen to show cause why such judgment, the same having become dormant, should not be revived against him, *held*, that the court

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acquired no jurisdiction over Ferdinand Olsen by a copy of the summons left at his usual place of residence, and that the judgment rendered against him in the name of "F. Olsen, full name unknown," was a nullity.

4. **Revivor of Judgment: DEFENSE: JURISDICTION.** A person summoned to show cause why a dormant judgment should not be revived against him may interpose the defense that such judgment is void, because the court pronouncing it had no jurisdiction over him, when such lack of jurisdiction appears on the face of the record of such judgment.

**ERROR** from the district court of Douglas county. Tried below before IRVINE, J.

The opinion contains a statement of the case.

*James A. Powers* and *Switzler & McIntosh*, for plaintiff in error :

But one Christian name is recognized by the courts. (Maxwell, Pleading & Practice, p. 87; *Choen v. State*, 52 Ind., 347; *Phillips v. Evans*, 64 Mo., 17.)

Where parties are known by different names, either one may constitute the Christian name in contemplation of law. (*Goodenow v. Tappan*, 1 O., 63.) Service by one name or the other is good, and judgment based upon such service is valid. (Bliss, Code Pleading, sec. 146.)

Where names are spelled differently, but substantially alike in sound, the proceeding is not vitiated thereby. (*Commonwealth v. Stone*, 103 Mass., 421; *Williams v. Hitzie*, 83 Ind., 303; *Miller v. Brenham*, 68 N. Y., 83.)

The judgment under the service was good. (*Johnson v. Jones*, 2 Neb., 131; *Tweedy v. Jarvis*, 27 Conn., 44; *Jones's Estate*, 27 Pa., 336; *Morse v. Engle*, 28 Neb., 545; *Goodenow v. Tappan*, 1 O., 63; *Scott v. White*, 71 Ill., 287; *Miller v. Brenham*, 68 N. Y., 83; *Commonwealth v. Gleason*, 110 Mass., 66; *Kemp v. McCormick*, 1 Mont. 423; *Rosencrantz v. Rogers*, 40 Cal., 491.)

*C. P. Halligan, contra.*

RAGAN, C.

On the 23d day of December, 1886, Lawrence C. Enewold brought suit on an account in the county court of Douglas county against one Olsen. In the petition filed Olsen was described as "F. Olsen, full name unknown." The sheriff's return of the summons in the case was as follows: "On December 23, 1886, I received this writ, and on December 23, 1886, I served by leaving a certified copy of this writ and indorsements thereon at the usual place of residence of the within named F. Olsen, the defendant, in Douglas county, Nebraska." The further proceedings of the county court in the case were as follows: "January 4, 1887, on the call of the docket, this day, it appearing to the court that the defendant F. Olsen, has been served with a summons and has failed to appear, plead, answer or demur thereto, and is in default: Now, therefore, on motion of plaintiff's attorney, it is ordered that default of the defendant be, and the same is hereby entered against him. The same day the case came on for trial to the court, L. C. Enewold, the plaintiff, was duly sworn and examined in his own behalf. After hearing the evidence, the court finds that said defendant, F. Olsen, real full name unknown, is indebted to the plaintiff in the sum of \$433.89. It is therefore considered, adjudged," etc. February 11, 1892, Lawrence C. Enewold filed in said county court a petition against Ferdinand Olsen praying for a revivor of said judgment. On said day the county court made an order that said judgment be revived unless Ferdinand Olsen should show cause why it should not be. On February 18, 1892, a copy of this order was duly served on Ferdinand Olsen, and he appeared in the county court and objected to a revival of said judgment on the ground that the same was void, as he, Olsen, was named in the summons "F. Olsen, full name unknown;" that the court could only acquire jurisdiction over him by the per-

sonal service of summons, and that the leaving a copy of the summons at his usual place of residence was not such service upon him as invested the court with jurisdiction over his person. The county court sustained the objection and dismissed the application to revive the judgment. Enewold took this order to the district court, where the ruling of the county court was affirmed, and Enewold brings the judgment of the district court here for review.

Section 69 of the Code of Civil Procedure provides: "The service [of summons] shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day." Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant." The law requires that a defendant shall be sued by his correct name, if known to the plaintiff suing him; and section 69 defines what shall be sufficient notice to him when thus sued. But cases may, and do, arise where the correct name of a party about to be sued is unknown to the plaintiff desiring to bring the action. To meet such cases section 148 was enacted, by which the party sued may be designated by any name and description; but to authorize the suing of a party by a name and description, *i. e.*, by any other than his correct name, the statute not only requires that the plaintiff should be ignorant of the correct name of the party, against whom he desires the law's process under a pseudonym, but to make oath that he has not been able to discover the party's true name. These prerequisites

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complied with, the plaintiff may proceed against the party by whatever name and description he chooses, but the summons in such a case must contain the words "real name unknown," and be personally served on the defendant sued, except in cases brought under section 23 of the Code of Civil Procedure. The law presumes that a party will see a summons left at his usual place of residence, and if in such summons he is notified by his true name that he has been sued, he must appear and make a defense if he has one; and if he fails to appear in obedience to the writ's command, he thereby confesses his liability and want of defense to the action, and is concluded by the judgment; but the law does not require Ferdinand Olsen, should he find on his door-step a summons directed to "F. Olsen," to know that such summons was meant for him. In such a case, to require Ferdinand Olsen to appear in obedience to the command of such summons, or be concluded by the judgment, the summons must be delivered to him personally. Ferdinand Olsen may suspect such summons was intended for him,—may even know it; yet, until a copy of it is personally served on him, he is not notified of a suit against him.

The inquiries here are: What, within the meaning of said section 148, constitutes a person's true name; and if Enewold was ignorant that Olsen's given name was "Ferdinand," was Enewold then ignorant of Olsen's true name, within the meaning of said section 148? In *Schofield v. Jennings*, 68 Ind., 233, it is said: "By the common law, since the time of William the Norman, a full name consists of one Christian or given name, and one surname, or patronymic. The two, using the Christian name first and the surname last, constitute the legal name of the person." It follows, then, that a person's legal name is made up of his first or given name and his surname, or patronymic; and, for one to be ignorant of either is to be ignorant of such person's name within the meaning of said section 148;

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and that in order to invest the county court with jurisdiction over Ferdinand Olsen in the suit brought by Enewold against him under the name of "F. Olsen, full name unknown," the summons in which Ferdinand Olsen was so designated must have been personally served on him. This not having been done, the judgment rendered by the county court, and which it is here sought to revive, was void. That such summons was left at Ferdinand Olsen's usual place of residence, and that he was aware of it, count for nothing. It might as well have been retained by the sheriff and Olsen notified by mail of its existence. A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction, and is utterly and entirely void. (Black, Judgments, sec. 220.) A statute which allows one party to take a personal judgment against another on proof that notice of suit was left at the defendant's usual place of residence ought not to be extended to cases where the party is sued by any other than his true name.

In this proceeding, one to revive a dormant judgment, Olsen is called on to show cause why the judgment should not be revived, and he alleges as a reason why this should not be done that such judgment is void, and that this appears from the record itself. Can Olsen be heard to make this objection in this proceeding? We think he can. In *Wright v. Sweet*, 10 Neb., 190, it is said: "Upon proceedings to revive a judgment which has become dormant, \* \* \* no objections will be heard which seek to go behind the original judgment." But this case does not decide, nor was it intended to decide, that a person against whom it was sought to revive a judgment might not make the objection that such judgment was void; that is to say, that there was no such judgment; and that such fact appeared on the face of the record. Suppose that Olsen had disregarded the notice served on him to show cause why this judgment should not be revived. The conditional

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order of revivor, then, would have become absolute; and there are authorities which hold that such order of revivor would estop Olsen from claiming that the original judgment was void, the proceeding to revive being in the nature of a suit on the judgment, and the order of revivor itself a judgment that the judgment revived was valid and in full force. (*Comparet v. Hanna*, 34 Ind., 74; *Kelly v. Donlin*, 70 Ill., 378; *Van Fleet*, Collateral Attack, sec. 236, and cases there cited.) This point is not necessary, however, to the decision of the case under consideration. It is not raised by counsel in their briefs, and we do not determine it. Nor must we be understood as deciding that a judgment is void because the defendant is sued or summoned, or described in the judgment rendered against him by a fictitious name, or because he is designated by an initial letter of his given name. What we do decide is that the judgment rendered by the county court in the case of *Enewold v. F. Olsen*, "full name unknown," was void as a judgment against Ferdinand Olsen, because the summons in the case was not personally served on him. There is no error in the record, and the judgment is

AFFIRMED.

IRVINE, C., having presided at the trial below, took no part in the decision here.

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OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY  
v. BERNARD CLARKE.

FILED JANUARY 16, 1894. No. 4309.

1. **Railroad Companies: ESCAPING STEAM: NEGLIGENCE: PERSONAL INJURIES: EVIDENCE.** In order to render a railroad company liable for injuries caused by horses running away in

39	65
39	46
39	65
41	865

consequence of fright caused by steam escaping from the valves of an engine, it must appear not only that the opening of the valves was unnecessary, but also that it was done under such circumstances as to imply a failure to exercise that care which a prudent and reasonable man would exercise under similar circumstances.

2. While negligence is an inference to be drawn from the facts, the existence of the facts themselves must not be left to conjecture, but facts must be established by evidence which would warrant a reasonable man in inferring negligence.
3. The evidence in this case re-examined, and held insufficient to sustain the verdict.

REHEARING of case reported in 35 Neb., 867.

*John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error:*

The burden of proof was upon the plaintiff. There is no evidence that the defendant's servant, in the management of the engine, unlawfully and unnecessarily opened the valves, and frightened the plaintiff's horses. The motion to direct a verdict for defendant should have been sustained. (*Howard v. Union F. R. Co.*, 30 N. E. Rep. [Mass.], 479; *Favor v. Boston & L. R. Co.*, 114 Mass., 350; *Abbot v. Kalbus*, 74 Wis., 506; *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wall. [U. S.], 448; *Morrison v. Phillips & Colby Construction Co.*, 44 Wis., 405; *Toomey v. London, B. & S. C. R. Co.*, 3 C. B., n. s. [Eng.], 146; *Ryder v. Wombwell*, 4 Ex. L. R. [Eng.], 39; *Pennoyer v. Allen*, 56 Wis., 512; *Union P. R. Co. v. Billeter*, 28 Neb., 430; *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis., 290.)

*F. P. Wigton and E. F. Gray, contra:*

There was proof to sustain the allegations of plaintiff's petition. It was properly submitted to the jury. The question of negligence was for the jury. The company,

under the evidence, is liable. (*Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 476; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Gordon v. Boston & M. R. Co.*, 58 N. H., 396; *Toledo, W. & W. R. Co. v. Hurmon*, 47 Ill., 298; *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B., n. s. [Eng.], 53; *Culp v. Atchison & N. R. Co.*, 17 Kan., 475; *Andrews v. Mason City & Ft. D. R. Co.*, 42 N. W. Rep. [Ia.], 513; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St., 405; *Walker v. Boston & M. R. Co.*, 13 Atl. Rep. [N. H.], 649; *Gulf, C. & S. F. R. Co. v. Box*, 17 S. W. Rep. [Tex.], 375; *Northern P. R. Co. v. Sullivan*, 53 Fed. Rep., 219; *Hill v. Portland R. Co.*, 55 Me., 438; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. [Tenn.], 52; *Stamm v. Southern R. Co.*, 1 Abb. N. C. [N. Y.], 438; *Hart v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 9.)

#### IRVINE, C.

An opinion in this case affirming the judgment of the district court was filed December 20, 1892, and is reported in 35 Neb., 867. A rehearing has been granted upon the question of the sufficiency of the evidence, the question being raised upon the proof of negligence upon the part of the plaintiff in error. The statement of facts in the former opinion suffices, without much by way of addition, for this.

The facts alleged for the purpose of establishing negligence on the part of the plaintiff in error may be analyzed as follows:

First—That the railroad company negligently permitted its engine to stand for an undue length of time at the north margin of the street. There is absolutely no evidence tending to establish these averments and a further consideration of the point is unnecessary.

Second—That the railroad company unlawfully neglected to have any flagman at the street crossing. The duty of

a flagman is clearly to keep a lookout and warn persons using the street of the approach of trains. Necessarily he cannot have any knowledge of the fact that locomotives receding or standing on the track are about to let off steam, and it is not his duty to warn passers-by of the fact that steam is about to escape. The presence or absence of a flagman could not in any manner affect the case, and there could be no recovery upon these averments. The jury was expressly so instructed and the instruction was correct.

Third—That as the plaintiff below approached the crossing the railroad company, by its servants, negligently, wrongfully, unlawfully, suddenly and without warning, let off and discharged steam from the locomotive and from its cylinders in great volume and noise, whereby plaintiff's horses were frightened, ran away, and threw the plaintiff from his wagon, causing the injuries.

It is upon these averments that the judgment must stand, if at all, and the court so treated the case upon the former hearing. The conclusions reached by the court upon the legal questions thus presented were there stated as follows: "A railway company in the legitimate transaction of its business has the right to use steam and is not liable for the proper and necessary use of the same, even if it result in injury to others, as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence." It was also held that the allegation that steam was blown off negligently, wrongfully, and unlawfully, implied that such action was unnecessary. We have no doubt that the petition stated the cause of action correctly. It was held in the former opinion that the railroad company would be liable for an injury sustained by reason of such an accident where the

horses were frightened by an engineer's negligently permitting steam to escape from his engine; but where it is said that the company is liable when such act is done unnecessarily, the term "unnecessary" must not be limited in its application to an absolutely unavoidable escape of steam. As said by the court in the syllabus of the former opinion, a railroad company has the right to use steam and is not liable for the proper and necessary use of the same, even if it results in an injury to others. The railroad company is in such cases liable for injuries caused by its negligence and its negligence alone. Its liability is to be measured by the same rule as that of an individual under similar circumstances. It is not for the consequences of every act not strictly necessary that one is responsible. I may drive along a highway for pleasure, no motive except seeking my own amusement inducing me to do so. The fact that I am so driving may cause an injury, but I am not responsible in damages therefor, simply because it was not necessary for me to be driving at that place and at that time; but if I am to be held responsible, it must be because I failed to exercise reasonable care in the manner of my driving. I may make alterations in my sidewalk and some one passing during the progress of those alterations may be injured, but I cannot be held responsible solely because it was not a matter of necessity for me at that time to make such alterations; but if I am responsible, it must be because I failed to observe reasonable care in making such alterations at the time and under the circumstances. In other words, an act cannot be determined negligent simply from the fact that it was not strictly necessary; but in order to constitute negligence there must either be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. (*Foxworthy v. Hastings*, 31 Neb., 825.)

We think, therefore, that the terms "needless" and "unnecessary," in the former opinion, are not to receive a strict construction but are to be taken in connection with the rule that the railroad company was liable only for negligence, and that in the legitimate conduct of its business it had a right to discharge steam from its locomotive even within the limits of a city and near traveled thoroughfares, provided in so doing it acted as a person of prudence would act under similar circumstances. Numerous authorities have been cited upon this branch of the case. Many of them are from states where the courts undertake to say as a matter of law whether or not a given state of facts constitutes negligence. Where this is done it is equivalent to saying that the circumstances only are questions of fact, and the inference to be drawn from them a question of law. This is not the rule in this state, but upon the contrary the rule here is that even where the facts are undisputed, but where, upon such facts, different reasonable minds may honestly draw different conclusions as to whether or not such facts establish negligence, the inference to be drawn is a question for the jury and not for the court. (*City of Lincoln v. Gillilan*, 18 Neb., 114; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

Starting, then, from these premises let us examine the evidence. The engine at the time the accident occurred was engaged in switching. It is not absolutely certain whether at the time the team took fright the engine was at a standstill or moving very slowly. It had crossed the street and had either come to a stop or was moving very slowly away from the street and was about to stop. There is much evidence to show that steam was escaping from the pop-valve, and it is within the ordinary experience of men that steam in so escaping makes a loud noise likely to frighten horses. There is also much evidence in regard to these pop-valves. They are necessary appliances for the safety of the engine.

In fact they are safety valves so adjusted as to open automatically when the steam reaches a certain pressure, and so permit the escape of steam before the pressure becomes so great as to endanger lives and property. The evidence shows without contradiction that an engine, especially when engaged in switching, must necessarily be kept at a steam pressure near the limit, and that while engineers endeavor so far as possible to prevent the accumulation of steam to such an extent as to cause the pop-valves to open, exigencies are such that it is impossible to absolutely regulate the accumulation of steam, and an escape from the pop-valve necessarily frequently occurs. Had this engine not been provided with a pop-valve, or had the pop-valve been permitted to get out of repair whereby an explosion occurred, there can be no doubt that negligence might be inferred from such a state of facts. It follows necessarily that negligence cannot be predicated under ordinary circumstances because there was a proper pop-valve, and because it did perform its proper office by permitting steam to escape in order to prevent a dangerous pressure.

Did the evidence show that the engine had been permitted to stand a long time at the crossing with the steam unnecessarily kept at a high pressure, it may be that such facts, followed by an escape of steam at the pop-valve, would justify an inference of negligence. But there is no evidence to show such a state of affairs. On the contrary, the uncontradicted evidence shows that, owing to the varying loads to be hauled by an engine engaged in switching, the steam must be kept at a high pressure; that the quantity of steam to be used from time to time cannot be accurately predetermined, and that the engine upon this occasion had not been allowed to stand with the steam unnecessarily kept up, but that it was then engaged in switching, and had either not yet stopped or had just been brought to a stop when the accident occurred. We are thus brought to a consideration of the averment that steam was unnecessarily allowed to

escape from the cylinders, and that caused the accident. As to whether or not steam was escaping from the cylinders the evidence is conflicting. Several witnesses testify positively that they saw steam escaping from such a part of the engine that it must have come from the cylinder cocks. The weight of this evidence was subject to criticism. In the first place these witnesses were all persons whose attention was casually attracted to the affair, and while it seems it was first drawn to the escaping steam, it was almost instantly diverted to the runaway horses and then to the injured plaintiff. The means of observation of these witnesses were therefore limited and their recollections not entirely to be trusted. In the next place their testimony upon this point met with direct and positive contradiction. These were questions, however, to be considered by the jury, and the evidence was sufficient to permit a finding that steam did escape from the cylinder cocks. It also appears that when steam escapes from the cylinder cocks it is because of a voluntary act on the part of the person in control of the engine in opening the valves. It further appears that these cylinder cocks are provided for the purpose of allowing condensed steam to escape from the cylinders, and that it is necessary to use them for that purpose in order to prevent the cylinder heads from being blown out. When the plaintiff rested his case the evidence upon this point simply showed that steam was escaping from the cylinder cocks. A motion was then made to direct a verdict for the defendant, which was overruled. We think there was nothing at this stage of the case to permit an inference of negligence. Negligence cannot be inferred from the mere fact that an accident happened. Negligence cannot be inferred from the mere fact that an act was done which it is proper, and even necessary, to do at some times and under some circumstances. Some evidence must be given of facts and circumstances from which a reasonable man might infer that in doing the act at that particular time and under

those particular circumstances the defendant failed to exercise due care and prudence. There was no evidence on the part of the plaintiff to show at what times and under what circumstances it was necessary to open the cylinder cocks. The evidence produced by the defendant certainly did not strengthen the plaintiff's case. The engineer testified that the cylinder cocks might have been open at the time; but if they were, there could have been no forcible discharge of steam under the circumstances existing as to the operation of the engine at that moment. He did not see the plaintiff until after the horses were frightened. His train was moving away from the street, or had, practically, at that instant, come to a stop after moving in that direction, and if he were observing his duty his attention would probably be turned away from the street and not towards it. There is no evidence to show that he willfully or wantonly, within the rule set out in *Thompson on Negligence*, cited in the former opinion, opened the cylinder cocks, and we can find no evidence permitting an inference that a state of facts existed which would have induced a reasonably prudent man to have kept them closed at the time in question. While negligence is an inference to be drawn by the jury from facts established, facts warranting such an inference must be established by evidence, and a jury must not be left to conjecture,—to infer not only negligence but the existence of facts which would constitute negligence. (*Kilpatrick v. Richardson*, 37 Neb., 731.) Where one generally has a right to do an act, in order to predicate negligence upon the doing of it in a particular instance, the burden is upon the plaintiff to show such facts and circumstances as rendered the doing of it in that instance negligent. The burden is not upon the defendant to show that the act was not negligent. Such is the case here. The opening of the cylinder cocks was, in general, a proper and reasonable act to be performed. It could only be negligence to open them in a particular instance,

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when there was no necessity of so doing, and when, in addition to that, the circumstances were such that a reasonably prudent man would not do so. The burden was upon the plaintiff to show that such special circumstances existed, and there is a complete and total failure of evidence upon the point.

REVERSED AND REMANDED.

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639	670
39	74
45	680

LOUISE P. DAYTON V. CITY OF LINCOLN.

FILED JANUARY 16, 1894. No. 5501.

1. **Instructions Upon Issues Not Controverted.** It is prejudicially erroneous to submit to the jury issues arising from the pleadings in support of which there stands, uncontradicted, sufficient competent evidence, where the effect of submitting such issues may be to mislead the jury and withdraw its attention from the controverted issues.
2. **Damages by Change of Grade of Streets.** In awarding just compensation for property damaged for public use, general benefits to the public at large from the proposed improvements cannot be considered, while special benefits to the property damaged may be. *Schaller v. City of Omaha*, 23 Neb., 325, followed.
3. **An instruction in such a case, whereby the jury is told that if the premises have not in fact suffered a diminution in their market value and were not damaged, the jury should find for the defendant, is erroneous in not excluding from the consideration of the jury general benefits.**
4. **Cities of the First Class: ALLOWANCE OF CLAIMS: ACTION FOR UNLIQUIDATED DAMAGES.** Section 36 of the act relating to cities of the first class does not provide for the allowance or rejection of claims against such cities for unliquidated damages by the city council, or for appeals from the action of the council on claims of that nature. Notwithstanding that section, an original action may be maintained for unliquidated damages in any court of competent jurisdiction.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

The opinion contains a statement of facts.

*J. R. Webster*, for plaintiff in error:

In the second instruction there are the following errors: The instruction requires proof of plaintiff's title, proof whereof had been waived in open court, so that it was no longer in controversy. It also left the jury free to find as they saw fit, on the question of whether plaintiff, prior to bringing suit, had filed her claim with the city clerk, a fact which plaintiff had established by record evidence, and which there was no attempt to controvert. The third and fourth instructions contain the same errors. An established fact admitted by the parties ought not to be thrown into controversy again by the court. (*Dunbier v. Day*, 12 Neb., 608; *Frederick v. Kinzer*, 17 Neb., 366.)

The instructions as to measure of damages are in effect that if the change of grade and fill makes no decrease in the vendible market value of the property, then there is no damage. This was error, because it did not distinguish between general and special betterments. General benefits are not proper matter of set-off against damages to property. (*Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 588; *Missouri P. R. Co. v. Hays*, 15 Neb., 229; *Schaller v. City of Omaha*, 23 Neb., 325.)

*N. C. Abbott*, City Attorney, and *Abbott, Selleck & Lane*,  
*contra*:

The second instruction properly presented to the jury the facts in issue under the pleadings. Where an instruction is given by which it is sought to include the whole of the case necessary to a verdict in favor of one of the parties to the action, all elements necessary to the conclusion should be embodied in the instruction. Otherwise it should not

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be given. (*Bowie v. Spaid*, 26 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 297.)

The rule of betterments laid down in the fourth and fifth instructions is the correct rule as established by this court. (*City of Plattsmouth v. Boeck*, 32 Neb., 297.)

Plaintiff's remedy, on disallowance of her claim by the city council, was by appeal to the district court. This is the remedy given by section 36 of the law governing defendant city, and the statute excludes the general remedy by independent suit in court. The district court having had no jurisdiction to try the action, this court has no jurisdiction to hear the case on error. The statute referred to is similar to the law governing the prosecution of claims against the county, and it has been held in a number of cases that the remedy against the county by appeal from the action of the county board is exclusive. (*Richardson County v. Hull*, 24 Neb., 339; *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Dixon County v. Barnes*, 13 Neb., 294.)

IRVINE, C.

This action was brought by the plaintiff in error against the city of Lincoln to recover damages sustained by property of plaintiff in error by reason of a change of grade of Ninth and G streets. The action was brought in the county court and appealed to the district court, where there was a trial, and a verdict and judgment in favor of the city. The defendant answered averring that the court had no jurisdiction, for the reason that the law requires all claims of the nature of plaintiff's to be presented to the city council for allowance or rejection, and that the only remedy for erroneous action on the part of the council is by appeal to the district court, and not by original action. This question was before the court in the case of *City of Lincoln v. Grant*, 38 Neb., 369; but that judgment was reversed upon other grounds and the question was not there

decided. The plaintiff in error contends that the lower court being without jurisdiction to try the case, this court is without jurisdiction to review it upon error, and there must be a judgment of dismissal for want of jurisdiction. The contention thus raised calls for a construction of section 36 of the act relating to cities of the first class. By that section it is provided as follows:

“All claims against the city must be presented in writing with a full account of the items, verified by the oath of the claimant, or his agent, that the same is correct, reasonable, and just, and no claim shall be audited or allowed unless presented or verified as provided for in this section and read in open council. The vote of each councilman upon the allowance of any claim shall be entered upon the minutes; *Provided*, That no claim arising either on contract or tort exceeding the sum of twenty-five dollars shall be allowed until the same shall have been read in open council and the name of the claimant and the amount and the nature of the claim published once in a daily newspaper published and of general circulation in said city. Not more than five words shall be used in stating the nature of any such claim. Any taxpayer in such city or the claimant may, after the allowance of any claim required by this section to be published, appeal therefrom to the district court of the county in which such city is situated by giving notice of such appeal to the city clerk within two days after the allowance of the same, and filing, within ten days after such allowance, a bond or obligation in favor of said city with the clerk thereof, and with good and sufficient sureties, to be approved by said clerk, conditioned that said appellant shall prosecute said appeal to effect and without any unnecessary delay, and pay all costs that may be adjudged against said appellant; and in an appeal by a taxpayer, in case the claimant finally recovers judgment for as much or a greater sum, exclusive of interest, as allowed by the council, such appellant shall pay

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all costs made by such appellate proceedings; and in an appeal by a claimant, in case such claimant does not recover of said city as large a sum, exclusive of interest, as allowed by such council, said claimant shall pay all costs made by said appeal. The procedure of such appeal shall be in all respects as near as may be like the procedure on appeal from the county board to the district court. In case of appeal no warrant shall issue for the payment of any claim until said appeal is finally determined. And to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of. No appeal bond shall be required of the city by any court in any case of appeal by said city."

This section requires in the first place that all "claims" against the city must be presented in writing under oath, read in open council, and the vote upon their allowance taken and recorded, and that claims in excess of a certain amount must first be advertised in a daily newspaper. It then provides for an appeal from the order of allowance or rejection either by the claimant or by a taxpayer. After the provision in regard to appeals comes the provision that "to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature and circumstance, and cause of the injury or damage complained of." The subject-matter of the section, its arrangement, and its language, all indicate an intention to classify demands against the city in two groups. The first consists of claims certain in amount or of such a nature as to be capable of liquidation with certainty. These are to be passed upon

in the first instance by the council, and the claimant or any taxpayer, if dissatisfied with the council's action, may appeal to the district court. The second group consists of such demands as present causes of action for unliquidated damages, and in regard to such demands the law does not provide for judicial action upon them by the council, but merely requires, as a condition precedent to bringing an action, that the city, by the presentment of a statement, shall be given notice within a reasonable time after the cause of action accrues, and this undoubtedly for the purpose of enabling its officials to investigate the facts before the evidence becomes dissipated. The council is, by reason of its relations to the city government, peculiarly unfitted to pass upon claims for unliquidated damages, and it was not the intention of the legislature to require that such claims should be first submitted to its judgment. The fact that the provision relating to appeals stands between those in regard to liquidated claims and those relating to unliquidated demands lends force to this conclusion, and if a doubt remained, the language would, we think, be conclusive. The first portion of the section expressly requires the council to act upon the claims therein referred to. That portion in regard to unliquidated claims contains no such requirement, but, on the contrary, expressly states that to "maintain an action" the claimant must first present his statement. Finally, to give it the construction contended for would be to permit this section, in an act not relating to judicial procedure, to fix a special and unreasonably short period of limitations to a certain class of actions, when the defendant happens to be a city of the first class. Whether such a special limitation could be sustained is at least doubtful. No valid argument can be based upon the decisions relating to counties. The statute providing for claims against counties differs from this, in that it contains no provision whatever in regard to unliquidated claims.

The court instructed the jury, among other things, as follows:

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"Second—The burden of the proof in this action is on the plaintiff to establish by a preponderance of the evidence all the material allegations of her petition. These material allegations are as follows:

"1. That she is the owner of lots 1 and 2, block 162, of the city of Lincoln.

"2. That in the year 1885 the defendant city had an established grade for its streets, and particularly for Ninth and G streets, at their intersection.

"3. That thereafter plaintiff erected dwelling houses and other improvements, permanent in their nature, on her said lots, constructing her improvements in reference to and in conformity with the then established grade on said streets.

"4. That after said improvements were made the defendant city changed the grade of its said streets, Ninth and G, to a higher grade at this intersection, by filling in the street in the front of the plaintiff's premises.

"5. That said change of grade and filling in said streets by defendant, damaged the property of the plaintiff.

"6. That plaintiff filed her claim for damages alleged to be sustained therefrom with the clerk of the defendant city, duly verified according to law, which defendant neglected and refused to pay."

In at least two respects this instruction left to the determination of the jury questions which, although put in issue by the pleadings, stand upon the evidence uncontroverted. One of these questions related to the ownership of the premises alleged to have been injured. Upon this point the defendant upon the trial waived proof. The other was upon the presenting of the statement required by section 36 above referred to. Proof was offered of the presenting of such a statement, received without objection, and no evidence was offered to contradict it. The submission to the jury of these questions was emphasized by the third and fourth instructions given by the court, of which we quote the third alone. The fourth was couched in similar language. The third was as follows:

“If you find from the evidence that plaintiff is the owner of the premises described in the petition, and if you find from the evidence that plaintiff erected on said premises dwelling houses and other improvements of a permanent nature, and if you find from the evidence that said defendant city had an established grade for the streets abutting said premises at the time said improvements, if any, were constructed thereon, and if you find from the evidence that said improvements, if any, were erected by plaintiff in reference to and conformity with said grade, if any, established on said streets, \* \* \* and if you find from the evidence that said change of grade and fill, if any such you find, damaged the said premises of plaintiff, if you find she owned them, then you are instructed that plaintiff is entitled to recover at your hands such a sum as will justly compensate her for the damage, if any done thereto, provided you further find that plaintiff presented a claim for compensation therefor and filed the same at the office of the clerk of defendant city in the manner required by law, and that defendant neglects and refuses to pay the same.”

We do not here hold that it is reversible error in every case to so frame instructions as to submit to the jury an issue raised by the pleadings upon which proof has been offered upon one side and not upon the other. But while ownership of the property and the presenting of a statement of the claim were both put in issue by the pleadings and both points essential to a recovery, the state of the evidence sustained only one finding upon these points. By the second instruction these issues were presented to the jury as questions open for its determination upon the evidence. By the third and fourth the conditional statements of these subjects may have led the jury to infer that as a matter of law these issues remained in the case as disputed questions, upon which they were at liberty to find as they saw fit. The instructions were in this respect misleading

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and must have tended to confuse the jury and withdraw their attention from the real issues in the case. They were, therefore, prejudicially erroneous. (*Dunbier v. Day*, 12 Neb., 596; *Frederick v. Kinzer*, 17 Neb., 366.)

Upon the question of the measure of damages the court gave the following instruction:

"Both plaintiff and defendant have introduced testimony as to the value of said premises immediately before and immediately after the alleged change of grade and fill were made in the streets fronting on said premises. If from the evidence you find that plaintiff owned said premises, that her improvements, if any, thereon were built upon a grade established by defendant and used on said streets, and if you find that defendant changed said grade, if any, and filled said streets to a higher level, then you are instructed that you should consider the evidence as to value of said premises immediately before and immediately after said change of grade and fill, if any were made, in connection with all other testimony of the case, and from all the testimony before you determine whether or not the premises described in the petition have, by reason of the changed grade and fill, if such you find, been in fact decreased in their pecuniary or market value. If from all the evidence under the instructions of the court you find that said premises were in fact diminished in their market value and damaged by the alleged acts of defendant, then your verdict should be for plaintiff. If from all the evidence under the instructions of the court you find that said premises have not in fact suffered a diminution in their market value and were not damaged as alleged, then you should find in favor of the defendant."

The effect of this instruction was to require the jury to find for the defendant if after the grading complained of the market value of the premises was as much as before. The instruction failed to state to the jury that there could be no deduction from the damages sustained by reason of

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Lincoln Vitrified Paving & Pressed Brick Co. v. Buckner.

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general benefits to the property. The plaintiff requested instructions upon this point, which were refused. It is now the settled law of the state that in the case of damages to abutting property special benefits may be set off while general benefits may not. (*Wagner v. Gage County*, 3 Neb., 237; *Schaller v. City of Omaha*, 23 Neb., 325.) The jury having been confined by the instruction to a consideration of the general question as to whether the premises had suffered a diminution in their market value, it was in effect told to consider all benefits, and the instruction was, therefore, erroneous.

REVERSED AND REMANDED.

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LINCOLN VITRIFIED PAVING & PRESSED BRICK COMPANY V. CLARISSA BUCKNER.

FILED JANUARY 16, 1894. No. 5609.

1. While evidence must be confined to the issues, it is not essential that it should always bear directly upon the precise point in issue, but is admissible if it affords a reasonable inference upon that point.
2. Negligence: PERSONAL INJURIES: EVIDENCE. Thus in an action for injuries sustained by a child who stepped into burning ashes deposited in a street, where it was shown that some one had been systematically depositing ashes for a considerable period at that spot, it was not error to permit a witness to testify that it was the defendant who had at other times near that of the accident been so doing.
3. Review: HARMLESS ERROR. The court will not reverse a judgment for personal injuries because of improper hypothetical questions put to medical experts for the sole purpose of proving the permanency of the injuries where the verdict is so small as to render it evident that the jury had not found the injuries to be permanent.

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Lincoln Vitrified Paving & Pressed Brick Co. v. Buckner.

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ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Charles O. Whedon*, for plaintiff in error, cited: *Woodbury v. Obear*, 7 Gray [Mass.], 467; *Williams v. Brown*, 28 O. St., 547.

*A. J. Cornish*, *contra*, cited: *Shaber v. St. Paul R. Co.*, 28 Minn., 108; *State v. Manchester & L. R. Co.*, 52 N. H., 528; *Foxworthy v. City of Hastings*, 25 Neb., 133.

IRVINE, C.

Clarissa Buckner, an infant five years of age, brought this suit by her next friend against plaintiff in error, alleging in brief that on or about the 29th day of July, 1889, the brick company unlawfully and negligently deposited on K street, in Lincoln, hot and burning coal, cinders, and ashes dangerous to the traveling public, and that the plaintiff, while walking upon that street, without negligence upon her part, stepped upon said coals, cinders, and ashes, whereby she was severely and dangerously burned in her feet and limbs. The answer was in effect a general denial. There was a verdict and judgment for plaintiff for \$300.

The first assignment of error argued is based upon the court's permitting the father of the plaintiff to testify that it was the custom of the defendant during the months of June, July, and August, 1889, to deposit the ashes from its kilns at the spot where the plaintiff was injured. This testimony was followed by proof by the same witness that during the week when the injury was sustained he saw the brick company hauling burning ashes to that spot. If this testimony were improper it is doubtful whether the brick company could avail itself of the error. Practically all the evidence offered by the company upon this issue was of the same character, consisting of testimony to the

effect that it was the custom of the company to throw water upon the ashes before they were hauled from the kilns. Both parties having resorted to this method of proof, it is doubtful if either could complain. (*Howell v. Graff*, 25 Neb., 130.) But we do not think that the admission of this evidence was erroneous. The proof showed that there was, or had been, a low spot at the point in question, and that there had been a more or less continuous depositing of ashes there by some one. Other witnesses testify that the ashes there deposited were brought from the kilns, and there was proof that the defendant's kilns were in close proximity and that there was no other kiln in the neighborhood. While generally the commission of an act cannot be established by proof of the commission of similar acts at other times, we think that here the deposition of the ashes constituted a continuous act, and that proof that it was the defendant company which was making the deposits in question generally, accompanied by proof of the other circumstances complained of, fairly tended to prove the precise issue in this case, which was the depositing of the particular ashes which caused the injury. The evidence cannot always be confined to the precise point in issue, but all evidence is admissible except that which is incapable of affording any reasonable presumption or inference as to the principal fact in dispute. (1 Greenleaf, Evidence, sec. 52.) Facts which, though not in issue, are so connected with the fact in issue as to form a part of the same transaction or subject-matter are deemed relevant to the fact with which they are so connected. (Stephen, Digest of Evidence, art. 3.) The judge may admit as relevant the evidence of all those matters which shed a real, though perhaps indirect and feeble light on the question in issue. (Taylor, Evidence, sec. 316.)

In this connection we should consider the assignments that the verdict was not sustained by the evidence, and that the court erred in giving instructions submitting the ques-

tion of negligence to the jury. These assignments are based upon the argument that there was a failure to prove that the defendant company deposited the ashes which caused the injury. What we have already said largely disposes of these assignments of error. But aside from the testimony above referred to there was that of at least one witness who saw the accident and testified directly that he saw these particular ashes brought from the kiln. It is true that the defendant offered evidence tending to show that all ashes were cooled down by water before they were hauled away, and that unless this were done they would burn the barrows used in hauling them and stifle the men engaged, with their fumes; but we cannot say that the jury was bound to believe this evidence in the face of the direct and positive testimony to the contrary.

Numerous errors are assigned because of the admission of the testimony of physicians in relation to the injury and its effect. These questions related mostly to the permanency of the injury. Without examining the evidence in detail, we think there is in the record sufficient evidence upon which to base the hypotheses of these questions. This is the principal objection urged. But even if the questions were unwarranted, we would not disturb the verdict upon this ground. The evidence shows, without contradiction, that the injury sustained was of a severe nature; that scars remained which would be permanent; that the child suffered excruciating agony; that she was confined to her bed for weeks and was unable for months to wear shoes. The verdict was only for \$300, and it is not possible that the jury could have found that the injuries were permanent, otherwise than as inflicting a permanent scar, because if such had been found the verdict would certainly have been much larger. Manifestly upon the permanency of the injuries the jury found for the defendant, and any errors in the admission of testimony directed simply to that point would be without prejudice. The evidence

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Doyle v. Holland.

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showed that between the time of the accident and the time of trial the child had been afflicted with eruptions and "running sores" upon the injured leg. One of the witnesses, Dr. Crim, was asked the following question: "In cases of that character, where it is followed by eruptions and you knew of no other cause to attribute those eruptions to except that the child had been burned previously where the eruptions were, what would you attribute those eruptions to?" He answered: "Injury from a burn." Previously general questions had been put to him seeking to elicit the cause of the eruptions, and his answers were, in effect, that in order to ascertain the cause he must have such knowledge as would exclude all sources of eruptions excepting the source suspected. We do not think this testimony was erroneously admitted when examined in connection with the rest of his testimony. It amounted to evidence that an injury from a burn would be a sufficient cause for such eruptions. There is abundant evidence that the general health of the child was good and no evidence whatever of the existence of other causes for eruptions. They had not occurred before the injury. They had occurred frequently since the injury. We find no material error in the record and the judgment must be

AFFIRMED.

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JAMES DOYLE, APPELLANT, V. MARY F. HOLLAND ET  
AL., APPELLEES.

FILED FEBRUARY 6, 1894. No. 5467.

1. **Usury.** On September 17, 1887, plaintiff loaned the defendants \$600 for one year at twelve per cent interest, the defendants giving their note secured by mortgage for \$672,—the same being the sum borrowed and one year's interest thereon,—payable in one year from date thereof, with eight per cent from maturity. In

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an action to foreclose the mortgage it was *held* that the contract was usurious.

2. **Extension of Usurious Loan.** It is a well settled rule that where the original loan is usurious, every subsequent extension of the same, even at a lawful rate of interest, is likewise tainted with the vice of usury.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

*Abbott & Abbott*, for appellant.

*Palmer & Hendee*, contra:

Where the original contract is tainted with usury, all subsequent renewals or extensions of the same are also tainted with the vice of usury. (*National Bank of Winterset v. Eyre*, 52 Ia., 114; *Exley v. Berryhill*, 33 N. W. Rep. [Minn.], 567; *Cottrell v. Southwick*, 32 N. W. Rep. [Ia.], 22; *Richards v. Kountze*, 4 Neb., 205.)

NORVAL, C. J.

This was an action to foreclose a real estate mortgage. The defendants interposed the defense of usury, which was sustained by the trial court, and a decree of foreclosure and sale was entered for the amount of the loan, less payments which had been made. Plaintiff appeals.

The testimony on both sides agrees that the defendants borrowed of the plaintiff \$600 on the 17th day of September, 1887, at twelve per cent interest for one year. To secure the payment of the loan they gave their promissory note, calling for \$672, due in one year from date thereof, at eight per cent interest from maturity, also a mortgage upon real estate. The sum of \$600, and no more, was received by the defendants on the note and mortgage, and the sum of \$72, by agreement of the parties, was included in the note as interest on the \$600 for one year. The amount of interest agreed to be paid, being in excess of the maximum rate

allowed by statute, tainted the contract with the vice of usury.

Plaintiff attempts to escape the penalty of usury upon the ground that, at the time the money was borrowed and the note and mortgage were executed, it was orally agreed that should the defendants desire to retain the money for the next year ensuing after the maturity of the note, they could do so by paying eight per cent interest for said year, and that when the loan became due, at the request of the defendants, the payment thereof was extended for another year. There is a conflict in the testimony whether the defendants were charged eight or ten per cent interest for the second year, the plaintiff testifying that he was only paid \$48 interest for that time, while the defendant Lawrence Holland testified that he paid \$60 as interest. The trial court found that the aforesaid agreement for an extension of the time of payment was not carried out.

But admitting that defendants only paid eight per cent interest on the loan for the second year, the contract was nevertheless usurious. Plaintiff charged, and the defendants paid, twelve per cent on the money for the first year, as all the testimony shows. This made the original contract unlawful, and the fact that but eight per cent was paid for the second year, which with the sum charged for the first year did not exceed ten per cent per annum on the loan for the two years, does not relieve the plaintiff of the penalty imposed by law for taking usurious interest. Neither the note nor mortgage contained any provision that the loan was to run two years from the making thereof. On the contrary the money, by the express terms of the note and mortgage, was payable one year from the making of the contract. It is not claimed that any mistake was made in drawing the papers. The alleged oral contemporaneous agreement that the note should run two years, instead of one, as therein written, was of no validity. Defendants had the right to pay off the loan, if they so desired, in one

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First Nat. Bank of Dorchester v. Smith.

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year after the same was made, and plaintiff could have enforced payment after the expiration of the year. Whether the contract would be usurious had the note contained a stipulation that it should run two years, with interest at twelve per cent for the first year and eight per cent for the second, it is unnecessary to decide, as that is not the case before us. Here the money was borrowed for one year, and no longer, at an unlawful rate of interest. The original contract being usurious, it is wholly immaterial that the payment of the loan was subsequently extended for another year from the maturity of the note at a lawful rate of interest. It is a rule well settled by the authorities that where the original loan is usurious, every subsequent extension of the same is likewise tainted with the vice of usury. (*Nelson v. Hurford*, 11 Neb., 465.)

The decree appealed from is fully sustained by the evidence and is therefore

**AFFIRMED.**

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**FIRST NATIONAL BANK OF DORCHESTER V. BENJAMIN  
A. SMITH.**

**FILED FEBRUARY 6, 1894. No. 4924.**

**Judgment for Too Small an Amount: EVIDENCE: REVIEW.**

Where, on the review of a judgment of the district court in an action at law, the uncontradicted evidence shows that the plaintiff in error should have recovered a larger sum, this court will reverse the cause.

**REHEARING** of case reported in 36 Neb., 199.

*F. I. Foss*, for plaintiff in error.

*Abbott & Abbott*, contra.

NORVAL, C. J.

This was an action brought against a national bank, under the provisions of section 5198 of the Revised Statutes of the United States, to recover the penalty for taking usurious interest. At the January term, 1893, of this court an opinion was filed in the case affirming the judgment of the district court. (36 Neb., 199.) Subsequently, a rehearing was granted on the petition of Smith, and the cause was again submitted for our consideration.

In the former opinion it was held that an action like this must be brought within two years from the payment of the usurious interest; that each payment of excessive interest is regarded as a "transaction," within the meaning of that term as used in the section of the statute above mentioned, and that the two years' limitation begins to run as to each payment of unlawful interest from the date the same was made. The soundness of the rule there stated is not now questioned by either party, but the plaintiff below, Smith, insists that on the former hearing we misconceived the facts; in other words, that he should have recovered a larger sum than was given him by the judgment of the lower court. After a careful perusal of the bill of exceptions we are convinced his contention is well founded, and that the writer overlooked some of the payments of interest. The record shows without contradiction that the following payments of usurious interest were made within the two years immediately preceding the institution of the suit in the court below, to-wit: May 27, 1887, \$19.80; June 6, 1887, \$20.12; August 15, 1887, \$10.11; March 3, 1888, \$13.27; December 29, 1888, \$9.83; February 9, 1889, \$69.20,—making a total of \$142.33 of excessive or unlawful interest paid by Smith to the bank within the two years' limitation. The judgment, therefore, should have been for double that sum, or \$284.66, instead of \$207.72.

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Dillon v. State.

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The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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JABE DILLON V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1894. No. 6223.

**Criminal Law: REVIEW.** In order to secure a review in this court of alleged errors occurring at the trial, such errors must be pointed out in a motion for a new trial, addressed to the district court, and a ruling obtained thereon.

**ERROR** to the district court for Furnas county. Tried below before WELTY, J.

*C. C. Flansburg*, for plaintiff in error.

*George H. Hastings, Attorney General*, for the state.

POST, J.

At the April, 1893, term of the district court of Furnas county, the plaintiff in error, Jabe Dillon, was convicted of the crime of assault with intent to inflict great bodily injury, and which he now seeks to reverse by means of a petition in error addressed to this court. In his petition numerous errors are alleged, all of which refer to rulings during the trial before the district court. We find accompanying the transcript a paper entitled, "Motion for a New Trial," in which the grounds stated are substantially the same as those assigned in the petition in error. It does not appear, however, to have been filed in the district court, nor is there anything in the record to indicate that it was ever passed upon by that court. The settled rule is, that in order to secure a review in this court of alleged

39	92
43	751
39	92
44	638

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Yager v. Lemp.

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errors occurring at the trial, such rulings must be assigned in a motion for a new trial, addressed to the trial court, and a ruling obtained thereon. (See *Gibson v. Arnold*, 5 Neb., 186; *Simpson v. Gregg*, 5 Neb., 238; *Harrington v. Latta*, 23 Neb., 84; *Miller v. Antelope County*, 35 Neb., 237.) It follows that the petition in error must be dismissed and the judgment of the district court

AFFIRMED.

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NICHOLAS YAGER V. WILLIAM J. LEMP.

FILED FEBRUARY 6, 1894. No. 5240.

1. **Final order: RULING ON DEMURRER: REVIEW.** The sustaining of a demurrer to a petition or answer is not such a final order as will be reviewed by petition in error in this court.
2. **Ruling on Motion to Docket Counter-Claim: REVIEW: FINAL ORDER.** Where a counter-claim is stricken out for the reason that it is foreign to the subject of the action, an order denying the defendant's motion to docket it as a separate cause of action, under the provision of section 126 of the Code, is not a final order and will not be reviewed in this court by petition in error.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

*Winfield S. Strawn*, for plaintiff in error.

*Brome, Andrews & Sheean*, contra.

POST, J.

This was a foreclosure proceeding in the district court of Douglas county by the defendant in error Lemp against Thomas F. Dupins and others, including the plaintiff in error Yager, whom it was sought to charge as an indorser

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Yager v. Lemp.

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of the notes mentioned in the mortgage. Yager filed a separate answer, and subsequently, by leave of court, an amended answer, in which he, first, admitted the indorsement of the notes; second, alleged that such indorsement was made as security for the payment of beer to be shipped by Lemp and sold by him as agent for said plaintiff at Omaha; that in carrying out said contract he purchased from Lemp a large amount of property then in use in connection with said agency, and by purchase from other parties added largely to the property (other than beer) which was necessary to successfully conduct the business of said agency; that he bought from Lemp large quantities of beer and paid largely thereon, and that the notes set out in the petition were a continuing security for the payment thereof; that after he had built up a prosperous business in said agency, Lemp, by fraud and conspiracy, took the same away from him, and also seized and converted all of the property used in the business of said agency, as well as the beer, to secure the payment of which he, Yager, had indorsed and transferred the notes in suit. He claimed judgment for the excess of damages over the amount, if any, he might be found indebted to Lemp. To this answer the latter demurred on the grounds, first and second, that the same constituted no defense to Yager's liability on the notes, and third, that the claim did not arise out of the contract or transactions alleged in the petition, and were not connected with the subject of the action, which demurrer was sustained.

Yager excepted, was defaulted, and the action was left to proceed against the other defendants. Yager also moved the court to docket his claim as a separate cause of action and allow him a jury trial thereon, but on sustaining the demurrer said motion was overruled, to which also an exception was taken. Yager thereupon filed in this court a petition in error in which he in different forms assigns as error the sustaining of the demurrer above mentioned and

the overruling of his said motion, but no final judgment had been entered at the time this proceeding was instituted. Nor is there any competent evidence that the cause has been subsequently disposed of on its merits, and we are not at liberty to assume that it is not now on the docket of the district court awaiting a hearing therein.

The remedy by petition in error under our Code, section 583, is restricted to final orders and decrees. By section 581 a final order is defined as one which in effect determines the action and prevents a judgment. That the sustaining of the demurrer to the counter-claim in this case is not a final order within the meaning of the Code is apparent from numerous decisions of this court. (See *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Daniels v. Tibbets*, 16 Neb., 666; *Aspinwall v. Aspinwall*, 18 Neb., 463; *Welch v. Calhoun*, 22 Neb., 167.)

It is contended by counsel for plaintiff in error that the provisions of section 126 of the Code are mandatory, and that it was not within the discretion of the district court to deny the motion to docket his counter-claim as a separate action. We think however, that this ruling, like the sustaining of the demurrer, is not a final order, since it in nowise involves the merits of the controversy. The authorities above cited we regard as decisive of the question. It follows that the petition in error must be

DISMISSED.

PHENIX INSURANCE COMPANY V. S. B. BACHELDER.

FILED FEBRUARY 6, 1894. No. 4398.

1. **Pleading: REPLY: CONFESSION AND AVOIDANCE.** A general denial in the reply puts in issue only the truth of allegations of new matter in the answer. Facts in the nature of a confession and avoidance must be specially pleaded.

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42	885
39	95
48	829

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Phoenix Ins. Co. v. Bachelder.

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2. The conclusion announced on a former hearing of this case, 32 Neb., 490, adhered to.

REHEARING of case reported in 32 Neb., 490.

*Fawcett & Sturdevant* and *John P. Davis*, for plaintiff in error.

*A. U. Hancock* and *Reese & Gilkeson*, contra.

Post, J.

This case was under consideration at the January, 1891, term and a reversal of the judgment of the district court ordered for reasons stated in the opinion, which is reported in 32 Neb., at page 490, and to which reference is made for a statement of the material facts.

A rehearing was subsequently allowed on the application of the defendant in error, and the cause again submitted on its merits. The defendant in error on this hearing practically relies upon one proposition, viz.: That by virtue of an agreement with the insurance company he was entitled to a credit on his note for the value of two surrendered policies of insurance; that he was ready and willing to pay the balance thereof whenever notified of the amount of such credit, and that his default is altogether attributable to the neglect of the company. The petition is in the usual form of action on policies of insurance.

The allegations of the answer necessary to be here noticed are: That in consideration of the five years \$1,600 policy of insurance the defendant in error paid in cash the sum of \$10 and his note in favor of the company for \$22, dated August 9, 1886, and maturing August, 1, 1887; that it was stipulated in both the policy and note that in case the latter was not paid in full at maturity the policy would be null and void during the continuance of such default; that at the time of the loss, to-wit, January 27, 1888, said note was due and wholly unpaid.

There is no controversy with respect to the foregoing allegations, except that defendant in error claims that he should have been credited on said note with the value of the surrendered policies. He makes no claim that such credit was equal to the face of the note, but the difference in favor of the insurance company does not appear from the record. If the stipulation, whereby the policy should be void during the period of default, is a reasonable provision (and under the authorities cited in the former opinion we cannot doubt that it is), it follows that said policy was not in force at the time of the loss, unless the default can be excused on the ground above stated.

Assuming the facts relied on to be, in law, a sufficient justification of the default, are they available for that purpose under the issues presented in this case? The distinct allegation of the answer, that the note was wholly unpaid at the time of the loss, was such new matter as by provision of our Code called for a reply. (*Dillon v. Russell*, 5 Neb., 488; *Payne v. Briggs*, 8 Neb., 78.) The only reply we find in the transcript is a general denial, while the facts relied on as a justification are in the nature of an avoidance, which must be specially pleaded. The only issue presented by the reply was the truth of the allegations of the answer. (*Quick v. Sachsse*, 31 Neb., 312.) It follows that facts tending to excuse the default were not admissible and cannot be relied on in this proceeding.

2. But if the justification had been specially pleaded, we think the judgment could not be sustained on that ground, for the reason that there appears to be a failure of proof on that issue. The defendant in error, who was a witness in his own behalf, was not examined on the subject. The agreement is claimed to have been made by one Weymouth, an agent of the company. Mr. Fox, another agent, who was present a portion of the time, gave the only evidence tending to sustain that contention. He was not present when the contract was made, and does not claim to have

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Fremont, E. & M. V. R. Co. v. Mattheis.

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witnessed the agreement relied on, but overheard Weymouth tell defendant in error, just as he was leaving the premises of the latter, that he would figure up the amount due for the canceled policies and credit it on the note. But whether that was one of the conditions of the contract of insurance, or a subsequent voluntary promise for the benefit of the insured, is a matter of conjecture.

It would seem, too, that in order to excuse payment of the balance so as to keep the policy in force, it should appear that the amount of the credit claimed was within the exclusive knowledge of the insurance company. There are, however, no facts disclosed which will warrant the inference that the defendant in error could not readily have computed the value of the policies surrendered, and thus have ascertained the balance due on his note. We are convinced that the conclusion previously announced is right and that the judgment should be

REVERSED.

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FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD  
COMPANY V. CLAUS MATTHEIS.

FILED FEBRUARY 6, 1894. No. 4310.

1. **Eminent Domain: PETITION: DESCRIPTION OF PROPERTY: AMENDMENT.** A county judge, in a proceeding by a railroad company to acquire the right of way by condemnation, may require the petition presented to him to be amended so as to contain a more specific description of the property which it is sought to appropriate.
2. **A condemnation proceeding will not be declared void** in a subsequent action by a land-owner, who had notice thereof in the manner provided by law, on the sole ground that the property described in the petition is the tract through which the road is located and not the particular part thereof appropriated for right of way purposes.

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Fremont, E. & M. V. R. Co. v. Mattheis.

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3. **Eminent Domain: SUFFICIENCY OF DESCRIPTION OF LAND: COLLATERAL ATTACK.** Where a petition for appraisers to assess damage on account of the appropriation for right of way purposes of a strip 100 feet wide through a particular tract of land, refers for a more specific description to an accompanying plat, which shows the location of the road through such tract, but without letters or figures to indicate courses and distances, such description will be *held* sufficient when assailed in a collateral proceeding.
4. The conclusion announced on a former hearing of this case, 35 Neb., 48, adhered to.

REHEARING of case reported in 35 Neb., 48.

*Switzler & McIntosh*, for defendant in error:

In condemnation proceedings the court should hold the condemning party to a strict observance of the statute. (*Republican V. R. Co. v. Fink*, 18 Neb., 82; *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 21; *Ray v. Atchison & N. R. Co.*, 4 Neb., 439.)

The description of the land taken, contained in the petition and other papers in the condemnation proceeding, is insufficient to give the county judge jurisdiction. (*Pennsylvania R. Co. v. Porter*, 29 Pa. St., 169; *London v. Sample Lumber Co.*, 8 So. Rep. [Ala.], 281; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich., 426; *State v. Armell*, 8 Kan., 294; *Spofford v. Bucksport & B. R. Co.*, 66 Me., 40; *Portland S. & P. R. Co. v. Commissioners of York County*, 65 Me., 292; *Missouri P. R. Co. v. Carter*, 85 Mo., 448; *In re New York C. & H. R. R. Co.*, 70 N. Y., 193; Mills, Eminent Domain, sec. 115; Lewis, Eminent Domain, sec. 350; Pierce, Railroads, p. 180; 1 Rorer, Railroads, 346.)

*John B. Hawley* and *B. T. White*, for plaintiff in error.

POST, J.

An opinion was filed in this case at the January, 1892, term. (See *Fremont, E. & M. V. R. Co. v. Mattheis*, 35

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Fremont, E. & M. V. R. Co. v. Mattheis.

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Neb., 48.) Subsequently the writer, believing that the question of the validity of the condemnation proceeding relied upon by the railroad company, had not received the careful consideration to which it was entitled, suggested a rehearing, which was accordingly ordered. Assisted by able arguments and briefs, we have patiently re-examined that question, and are entirely satisfied with the conclusion reached on the former hearing. There appears, from a casual examination of the authorities, to be an irreconcilable conflict of opinion as to the description essential in order to confer jurisdiction upon the court, or other officers authorized to award damage in this class of cases. But from a careful examination of the cases the apparent conflict is found to be due in a large measure to a diversity of laws regulating the appropriating of private property in the exercise of the right of eminent domain. In the earlier cases it is observable that by the general laws, as well as special charters, the condemnation proceeding had the effect of a deed, and upon payment of the damage awarded the title of the property acquired was vested in the corporation or other agency of the state, and the damage of the owner was limited to compensation for the property actually taken. The reasons upon which those decisions rest are wanting in this state where the damage includes not alone the value of the property taken, but injury to the entire tract. Strictly speaking, the proceeding under our statute is to determine the amount of the injury to the land-owner's property, whatever may be the extent thereof, and of which the value of the property actually taken is but an element. It would seem, therefore, that a petition describing the tract or body of land which is the subject of the controversy is sufficient to give the county judge jurisdiction, although the fraction thereof sought to be appropriated may not be described with technical accuracy.

We are not aware that a description of the character of the one under consideration has ever been held insufficient

in a strictly collateral proceeding. In each of the cases cited by defendant in error, with the single exception, we believe, of *State v. Armell*, 8 Kan., 288, the question arose in a direct proceeding; and in the exception named the controversy involved the extent of the right acquired, and not the validity of the condemnation. It will be conceded that the powers exercised by the county judge in this proceeding are special and limited, and not in accordance with the course of the common law; but it is quite as well settled that his judgments and orders cannot be assailed indirectly on account of mere errors or irregularities (Black, Judgments, 250.)

The property described in the petition is "the right of way one hundred feet wide over, across, and through the \* \* \* northeast quarter of the southeast quarter of section No. thirty-six, township No. fifteen, range No. twelve east; \* \* \* all of the above property being fully described and marked by red lines on the plat hereto attached and marked Exhibit 'B' and made a part thereof. The following named persons have and claim title, ownership, and interest in the above described real estate, to-wit: \* \* \* C. Mattheis." The prayer of the petition is that "the commissioners heretofore summoned be directed to inspect said real estate and assess the damages which the owners or parties interested therein shall sustain by the appropriation thereof to the use of said company as aforesaid." On the 28th day of May, 1887, notice in writing was given the defendant in error that on the 10th day of June following said "commissioners" would assess his damage for the appropriation of the right of way through his premises, as the same was then staked out and located. Assuming the above description to be less specific than contemplated by law, objection on that ground comes too late when made for the first time after the damage has been assessed and the road constructed. It cannot be said that there is not available to the land-owner in such

cases an adequate remedy by direct proceeding. Without doubt the county judge is authorized to exercise the same control over the warrant or commission to the appraisers as over any other process issued by him. If the allegations of the petition are indefinite, an amendment may be allowed; and if there is no authority for the issuing of the writ, it may be quashed and set aside upon the motion of one adversely interested; and although the writ of *certiorari* has been abolished in this state, the district court may still compel the proceedings of an inferior tribunal to be certified up for review.

An instructive case, and one directly in point, is *Cleveland & T. R. Co. v. Prentice*, 13 O. St., 373, which was an action to recover for the value of a strip of land one hundred feet wide across lot 15, in river tract No. 87. The railroad company relied upon a condemnation of the premises for right of way. The description shown by the record introduced in evidence was "fifty feet wide on each side of said railroad, as last surveyed, through \* \* \* lots Nos. 11, 12, 13, 14, and 15 of the subdivision of river tract No. 87." In holding the foregoing description sufficient, Sutliff, C. J., says: "The authorities will be found, I apprehend, less strict in requiring definite description of roads where the question is not made until after the road has been opened and in use, than in those cases where the question as to the *locus in quo* has been raised *in limine*."

In *Lower v. Chicago, B. & Q. R. Co.*, 59 Ia., 563, the land condemned was fifty feet on each side of the center of the railroad track "as the same is located, staked, and marked." This was held a sufficient description in a collateral proceeding, although it did not in all respects correspond to the land described in the notice of condemnation. Our views are supported also by the following cases: *Stephenville v. Overby*, 22 S. W. Rep. [Tex.], 121; *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo., 288; *Chicago, M. & St. P. R. Co. v. Randolph Townsite Co.*, 103 Mo., 451.

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Nickolls v. Barnes.

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In the case of *Trester v. Missouri P. R. Co.*, 33 Neb., 171, the petition, which was held sufficient, contained the following description: "The N.  $\frac{1}{2}$  S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , section 24, Tp. 10, R. 6 E., 100 feet wide and through the same." And although no reference is made in the syllabus to the sufficiency of the description that question was presented by the record and was evidently determined, as appears from the following language used by the present chief justice, on page 185: "The petition presented to the county judge in every respect complied with the statute relative to the appropriation of real estate for right of way purposes." Our conclusion is that the petition was sufficient to give the county judge jurisdiction, and that the condemnation proceeding is a sufficient justification of the trespass alleged in this action. The judgment of the district court is therefore

REVERSED.

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W. D. NICKOLLS V. E. C. BARNES ET AL.

FILED FEBRUARY 6, 1894. No. 4085.

1. **Landlord and Tenant: LEASE.** Where an agreement for the lease of a piece of real estate is reduced to writing, and bears the signatures of the lessees but not that of the lessor, and possession taken under such agreement by said lessees, and the payment of rent made by them, and by said lessor accepted, and said lease, had it been properly executed, would have been for the term of one year, though payments of rent under such agreement are to be made monthly, *held*, that said lease is valid as an oral lease for one year, and said lessees are thereby made tenants for one year.
2. Former decision in this case reported in 32 Neb., 195, is overruled.

REHEARING of case reported in 32 Neb., 195.

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Nickolls v. Barnes.

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*A. H. Babcock* and *E. O. Kretsinger*, for plaintiff in error:

The signing of the lease by the lessees, and taking possession of the leased premises, and paying rent under the lease, which lease was accepted by the lessor and placed upon record, and rent received under it, made it a perfect, binding lease for one year upon both parties, even though it may not have been signed by the lessor. (*Filton v. Inhabitants of Hamilton City*, 6 Nev., 196; *Finley v. Simpson*, 2 Zab. [N. J.], 311, and cases cited; *McFarlane v. Williams*, 107 Ill., 33; *Catlett v. Catlett*, 55 Mo., 332; *Ciason v. Bailey*, 14 Johns. [N. Y.], 486; *Kershaw v. Kershaw*, 102 Ill., 307; *Galbraith v. McLain*, 84 Ill., 379; *Traylor v. Cabanne*, 8 Mo. App., 131; *McConnell v. Brillhart*, 17 Ill., 354; *Barry v. Coombe*, 1 Pet. [U. S.], 650; *Penniman v. Hartshorn*, 13 Mass., 87; *Saunderson v. Jackson*, 3 Esp. [Eng.], 181; *Bluck v. Gompertz*, 7 Exch. [Eng.], 862; *Evans v. Ashley*, 8 Mo., 181; *Lockwood v. Lockwood*, 22 Conn., 425; *Atlantic Dock Co. v. Leavitt*, 54 N. Y., 35; *Reeder v. Sayre*, 70 N. Y., 183; *People v. Rickert*, 8 Cow. [N. Y.], 226; *Pugsley v. Aikin*, 11 N. Y., 494; *Morrill v. Mackman*, 24 Mich., 286; *Koplitz v. Gustavus*, 48 Wis., 48; *Laughran v. Smith*, 75 N. Y., 205; *Friedhoff v. Smith*, 13 Neb., 5; *Doe v. Bell*, 5 Term Rep. [Eng.], 471; *Schuyler v. Leggett*, 2 Cow. [N. Y.], 660; *Greton v. Smith*, 33 N. Y., 245; *Clayton v. Blakey*, 8 Term Rep. [Eng.], 3; *Coan v. Mole*, 39 Mich., 454; *Schneider v. Lord*, 62 Mich., 141; *Walker v. Furbush*, 11 Cush. [Mass.], 366.)

*George A. Murphy* and *A. G. Whitney*, also for plaintiff in error.

*Hugh J. Dobbs*, contra:

A lease executed by the lessee alone is void, though followed by possession, and payment and acceptance of rent.

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(Wood, Landlord and Tenant, sec. 218; Taylor, Landlord and Tenant [7th ed.], sec. 35; *Soprani v. Skurro*, Yelv. [Eng.], 19; *Pitman v. Woodbury*, 3 Exch. [Eng.], 4; *Swatman v. Ambler*, 8 Exch. [Eng.], 72; *Cammeyer v. United German Lutheran Church*, 2 Sand. Ch. [N. Y.], 186; *Miller v. Pelletier*, 4 Edw. Ch. [N. Y.], 106; *McLeran v. Benton*, 73 Cal., 329; *Carlton v. Williams*, 77 Cal., 89; *Laughran v. Smith*, 75 N. Y., 205; *Coudert v. Cohn*, 118 N. Y., 309; *Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Neb., 679; *Anderson v. Harold*, 10 O., 399; *Bailey v. Ogden*, 3 Johns. [N. Y.], 399; 3 Parsons, Contracts, p. 5; *Stokes v. Moore*, 1 Cox Ch. [Eng.], 219; *Wade v. City of Newbern*, 77 N. Car., 460.)

*A. Hardy*, also for defendants in error.

HARRISON, J.

An action of replevin was commenced in the district court of Gage county, Nebraska, by W. D. Nickolls against E. C. Barnes, C. J. Barnes, Smith Y. Hill, Hugh J. Dobbs, Charles Moschell, and John Foster, for the recovery of certain personal property, consisting of furniture and household goods, the action by him being founded upon his rights under an instrument in writing, signed by the Barneses, of defendants, and which was in form a lease with chattel mortgage clause inserted and purporting to secure the payment of the rent. The term of leasing, as set forth in the instrument, was to commence August 25, 1888, and to terminate August 25, 1889, the rental to be the sum of \$690 for the year, and paid monthly in advance and in sums as stated in said instrument. A statement of the case was made in the decision of it in this court on June 30, 1891, contained in 32 Neb., 195, 49 N. W. Rep., 342, to which parties are referred for a statement of the case. There was a trial to a jury in the lower court, and verdict against the plaintiff, and judgment on

the verdict. The case was brought here on error and the judgment of the district court affirmed in the opinion of the court filed June 30, 1891. (*Nickolls v. Barnes, supra.*)

A motion for rehearing was filed August 3, 1891, and rehearing granted January 6, 1892, and the case submitted on briefs of the parties. The question decided on the former hearing of the case was in reference to the validity of the instrument of contract of lease, and it was held by this court "that the instrument claimed to be a lease, not having been executed by W. D. Nickolls, vested no estate in the Barneses, they were only liable for rent for the time they actually occupied the building." In the first hearing in the case the counsel in their brief did not call attention of the court to a former decision of this court in *Friedhoff v. Smith*, 13 Neb., 5, and in rendering the decision in the case at bar the court doubtless overlooked this decision of a like or similar question. At least no mention was made of it.

In the case of *Friedhoff v. Smith* appears the following statement: "It appears from the evidence that Smith rented a store-room to the plaintiffs in error for the period of two years from the first day of March, 1880, at the rent of \$40 per month, payable monthly; that the plaintiffs entered into possession of the premises and remained in possession until September, 1880, when, during Smith's temporary absence from the state, they abandoned the premises, leaving the keys with Smith's clerk in an adjoining store. Smith kept the store-room, subject to the use and control of the plaintiffs in error, until March 1, 1881, and then demanded the balance of the rent, which the plaintiffs in error refused to pay." The syllabus of the case is as follows: "A parol lease for two years, although void by the statute, yet if the tenant enter into possession, is valid as a lease for one year." MAXWELL, J., in the body of the opinion, says: "A parol contract for the leasing of land for a longer period than one year is void; that

is, there is no authority to make the lease, but a verbal lease for one year is valid; and if the tenant enter into possession under a lease void by the statute because not in writing, and is to pay rent at stated periods within the statute, the lease may be valid for the length of time the parties had authority to enter into the contract. Here was a lease for twenty-four months, under which the tenant took possession. The parties had authority to make a lease for twelve months, and it is only the excess that is void, and it is void only because of the limitation upon the power to make the contract, but to the extent of the authority the lease is valid. The lease, therefore, was valid for one year. The question whether the lease was from month to month or by the year was properly submitted to the jury."

The lease in the case at bar, as to the term and payment, was as follows: "To have and to hold the same to the said parties of the second part from the 25th day of August, 1888, to the 25th day of August, 1889, and the said parties of the second part, in consideration of the leasing of the premises as above set forth, covenant and agree with said party of the first part to pay the party of the first part, as rent for same, the sum of \$690, payable as follows, to-wit, \$55 cash, and \$55 on the 25th day of September next, and \$55 on the 25th day of each and every month for the first six months, and to pay \$60 on the 25th day of each and every month during the last half of the aforesaid year. Party of the first part agrees to give parties of the second part the first privilege of renting at the expiration of this lease at whatever it will bring in any line of business." The lease was executed by the Barneses September 5, 1888. This was clearly, and without question, an agreement between the parties for a renting of the premises for the term of one year, and the Barneses took possession, held possession, and paid the rent from the execution of the lease to the 25th of December, 1888.

The section of the statute which applies to leases is as

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Nickolls v. Barnea.

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follows: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands shall be void unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made." (Comp. Stats., ch. 32, sec. 5.)

This was unquestionably a lease for one year, and unobjectionable as an oral lease of the premises, and not void as such, when measured by the terms of the statute above quoted. The case in 13 Neb., before referred to, recognizes and is decided upon the principle or rule that where a lease is executed, or an agreement for lease is entered into, and the parties enter upon the execution of the contract, the one by taking possession of the premises, the subject of the contract, and paying the rent, and the other by receiving the rent, if the lease executed is void or the lease for which the agreement has been made is not executed, and by the terms would have been for one year, or for more than a year at a yearly rental, notwithstanding it may be payable monthly, it will be held a lease by the year, and the tenant a tenant by the year. We are fully satisfied that the decision in 13 Neb. was right and supported by the weight of authority and reason. It follows that the former decision in this case must be overruled, and as this will occasion a new trial of the case in the lower court, we will not examine or discuss it further. The judgment of the lower court is reversed and the case remanded.

REVERSED AND REMANDED.

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Byrd v. Cochran.

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58-127

MILTON BYRD, APPELLEE, v. ELMER G. COCHRAN ET  
UX., APPELLANTS, AND PHILADELPHIA MORTGAGE  
& TRUST COMPANY ET AL., APPELLEES.

39	109
44	15
144	246

FILED FEBRUARY 6, 1894. No. 5190.

1. **Affidavit for Mechanic's Lien: VALIDITY OF JURAT.**

Where an affidavit, attached to a mechanic's lien, purports to have been sworn to before a notary public and shows upon its face that it was taken or made without the jurisdiction of the notary public it is invalid, insufficient to perfect the lien, and renders it incompetent as evidence.

2. **Mechanics' Liens: CONTRACTS: MATERIALS USED IN TWO**

**BUILDINGS: SUFFICIENCY OF STATEMENT.** When a subcontractor paints two separate houses and furnishes the paint and other materials necessary for use in the painting, contracting for such work and materials with the original contractor, the consideration for such agreement being in one sum for both jobs, in order to recover upon a mechanic's lien filed against one of the houses and the lot upon which it stands, it must be shown that the amount charged against the one house and lot is the value of the labor performed upon, and materials furnished for, such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guess work will not suffice to establish the lien.

3. ———: **REVIEW.** THE EVIDENCE examined, and *held* insufficient to establish mechanics' liens or to support a decree for their enforcement.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The opinion contains a statement of the case.

*B. F. Cochran*, for appellants:

The affidavit for a lien shows the venue to be Webster county. The attesting seal is that of a notary public of Douglas county. The affidavit was insufficient, and the filing of the paper did not create a lien. (Secs. 5, 6, ch. 61,

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Comp. Stats.; *Blair v. West Point Mfg. Co.*, 7 Neb., 147; *Colman v. Goodnow*, 36 Minn., 9; *Davis v. Rich*, 2 How. Pr. [N. Y.], 86; *Sandland v. Adams*, 2 How. Pr. [N. Y.], 127; *Snyder v. Olmsted*, 2 How. Pr. [N. Y.], 181.)

One who contracts directly with the owner, and for a single contract price, need not itemize his account; yet as to subcontractors the rule is different. (2 Jones, Liens, sec. 1416; *Gray v. Dick*, 97 Pa. St., 142.)

*Montgomery, Charlton & Hall, contra*, cited: *Manly v. Downing*, 15 Neb., 637; *Ballou v. Black*, 17 Neb., 398, 21 Neb., 146; *Doolittle v. Plenz*, 16 Neb., 153; Phillips, Mechanics' Liens [2d ed.], 373; *Kerbaugh v. Henderson*, 3 Phila. [Pa.], 17; *Davis v. Farr*, 13 Pa. St., 167; *Edwards v. Edwards*, 24 O. St., 402.)

*John O. Yeiser*, for appellee Byrd.

HARRISON, J.

In this case the plaintiff Milton Byrd commenced an action in the district court of Douglas county to foreclose a mechanic's lien, alleging in his petition that defendant Elmer G. Cochran owned, or was the reputed owner of, a certain lot or small piece of land in said county; that on or about the first of June, 1889, said Elmer G. Cochran, entered into a contract with W. M. Bell and T. J. Hines, whereby they agreed to furnish labor and materials and erect for Cochran a dwelling upon the said land; that on the 29th day of August said contractors employed the plaintiff Byrd to do the plastering and cement the cellar, which work was done by plaintiff, and that the contractor agreed to pay him therefor as follows: For the plastering, nine cents per yard, there being 850 yards, amount due for same, \$76.50; cementing cellar, \$2.50. That the said contractors gave him an order on Cochran for the above amount, which order is set forth in full in

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Byrd v. Cochran.

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the petition; that he has not been paid; that he executed in due form, and within the time required by law, lien papers, and filed the same with the recorder of Douglas county, Nebraska, and after the usual allegations of such petitions, asks foreclosure of the lien and judgment against the contractors.

Defendant Elmer G. Cochran answered the plaintiff's petition as follows:

"1. Denies each and every allegation contained in the second paragraph of said petition, except that the particulars of the alleged contract are unknown to the plaintiff.

"2. Denies that he ever employed the plaintiff to do any work whatever.

"3. Denies that he ever agreed to pay the plaintiff for any work; and

"4. Denies that he ever 'agreed upon a settlement of the amount due plaintiff on said work, in a written order' or otherwise.

"5. Said defendant also denies that the plaintiff has acquired any lien on the premises described in his petition."

Gertrude Cochran, wife of Elmer G. Cochran, filed the following answer to plaintiff's petition:

"1. She denies each and every allegation contained in the second paragraph of said petition, except the allegation of want of knowledge of the particulars of the alleged contract.

"2. Defendant has not sufficient knowledge or information to form a belief as to the truth of the allegations in the third paragraph of said petition, and therefore denies each and every allegation contained in said third paragraph.

"3. Defendant further answering alleges that said petition does not state facts sufficient to constitute a cause of action."

The venue of the affidavit to the lien was as follows:

"STATE OF NEBRASKA, }  
WEBSTER COUNTY. } ss."

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And the date: "Omaha, Neb., Oct. 14, 1889."

And the jurat and seal:

"Sworn to by said Milton Byrd before me, and by him subscribed in my presence, this 15th day of Oct., '89.

"B. R. BALL,

*"Notary Public in and for the County and State aforesaid."*

Seal: "B. R. Ball. Commission expires Jan. 20, 1892.  
Notarial Seal. Douglas County, Nebraska."

J. A. Fuller & Co. appeared and by leave of the court filed answer and cross-petition. Their claim being a contested one, we will copy the answer and cross-petition below:

"Come now the defendants J. A. Fuller & Co., and by leave of the court, first obtained, file this, their separate answer to the petition of the plaintiff, and allege that the said J. A. Fuller & Co. is a copartnership, of which John A. Fuller and John H. Dumont are the only members.

"As to the truth of the allegations in plaintiff's petition contained, these defendants have no knowledge or information upon which to form a belief, and therefore deny the allegations therein contained.

"For their cause of action herein these defendants allege that on or about the 29th day of June, 1889, the defendant Joe Johnson entered into a contract with the defendant W. M. Bell, whereby he agreed, in consideration of the payment to him of the sum of \$380, to furnish the material and to do the work and labor in the painting of two houses then in process of construction, one house on the premises described in plaintiff's petition, to-wit: Commencing with a point thirty-three (33) feet east and thirty-three (33) feet north of the southwest corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred twenty-four (124) feet, thence south fifty (50) feet to the place of beginning; and the other house upon prem-

ises likewise described. A copy of the written proposition of the said W. M. Bell to pay the said Joe Johnson the sum of \$380 for the painting of said houses is attached to the mechanic's lien hereinafter referred to, which lien is attached to this answer, marked 'Exhibit A,' and made a part hereof.

"In pursuance of said contract the said Joe Johnson furnished the material and performed the labor and did the painting of said house according to the contract between the owner and said Bell, and the fair value of the work and labor performed and the materials used in the painting of the house upon the premises above described is the sum of \$177.50, of which amount affiant has been paid, to apply upon the amount due him for painting the house upon the premises above described, the sum of \$115, leaving a balance due thereon of \$62.50, no part of which has been paid him, although payment thereof has been demanded, but refused. At the time said Joe Johnson entered into said contract with the said W. M. Bell the said Bell was engaged as a contractor and builder in the city of Omaha, and as such had entered into a contract with the defendant Elmer G. Cochran for the erection and painting of said house upon said above described premises. At the time said Bell entered into said contract with the said Cochran the said Cochran was the owner in fee of said above described premises.

"On the 20th day of November, 1889, the said Joe Johnson made an account in writing of the material furnished and labor performed in the painting of said house, and after making oath thereto as required by law, on the 21st day of November, 1889, and within sixty days of the time of furnishing said material and performing said labor under said contract, filed said account and affidavit in the office of the register of deeds of Douglas county, Nebraska, claiming a mechanic's lien upon the said premises and the building thereon. On the 21st day of November, 1889,

and after the filing of said lien as aforesaid in the register's office, the said Joe Johnson, for a valuable consideration, sold and assigned the said mechanic's lien to these defendants, who are now the owners and holders of the same. The said Joe Johnson paid for recording his said lien in the register's office the sum of \$1.25.

"There is now due these defendants, upon the said mechanic's lien, the sum of \$62.50, and the sum of \$1.25 for recording the same, with interest upon the said amounts at the rate of seven per cent per annum from the 26th day of September, 1889."

Prayer was for judgment against the contractor, and foreclosure of the lien.

The agreement between contractor and subcontractor, the statement of account, affidavit for lien, and assignment of lien to Fuller & Co. were as follows, being Exhibits "C," "E," and "D":

EXHIBIT "C."

"OMAHA, NEB., June 29, 1889.

"I hereby agree to pay to Joe Johnson the sum of three hundred and eighty (\$380) dollars for painting two houses at 36 & Pacific, according to plans and specifications; one house for E. G. Cochran, one for H. E. Cochran.

"W. M. BELL."

EXHIBIT "D."

"For value received I hereby sell, assign, and transfer to J. A. Fuller & Co. a certain mechanic's lien for the sum of \$62.50, on the following described premises, to-wit: Commencing at a point 33 feet east and 33 feet north of the southwest corner of section 21, township 15, range 13 east, in Douglas county, Nebraska, running thence east 124 feet, thence north 50 feet, thence west 124 feet, thence south 50 feet to the place of beginning; which lien is dated November 20, 1889, and was filed for record on the next day in the office of the register of deeds of Douglas county,

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Nebraska, against Elmer G. Cochran, the owner of said premises.

"Witness my hand this 21st day of November, 1889.

"JOE JOHNSON."

EXHIBIT "E."

"JOE JOHNSON V. W. M. BELL ET AL.	}	OMAHA, NEB., Nov. 20, 1889.
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"W. M. Bell, To Joe Johnson, Dr.

"To balance due for material furnished and labor performed in the construction of one frame dwelling house, belonging to Elmer G. Cochran, upon the following described property, to-wit: Commencing at a point thirty-three (33) feet east and thirty-three (33) feet north of the south corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred and twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred and twenty-four (124) feet, thence south fifty (50) feet to the place of beginning, \$62.50.

"STATE OF NEBRASKA, }  
DOUGLAS COUNTY. } ss.

"Joe Johnson, being first duly sworn according to law, makes oath and says that he has furnished the material and performed the labor necessary for the painting of a certain frame dwelling house upon the following described premises, to-wit: Commencing at a point thirty-three (33) feet east and thirty-three (33) feet north of the southwest corner of section twenty-one (21), township fifteen (15), range thirteen (13) east, in Douglas county, Nebraska, running thence east one hundred and twenty-four (124) feet, thence north fifty (50) feet, thence west one hundred and twenty-four (124) feet, thence south fifty (50) feet to the place of beginning. The said materials were furnished and the said labor performed under and by virtue of a written agreement signed by W. M. Bell, who himself had entered into a con-

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tract with the said Elmer G. Cochran, for the erection and construction of said frame dwelling house. A copy of said written agreement between affiant and W. M. Bell is hereto attached, marked Exhibit 'A' and made a part hereof. According to said agreement, said affiant was to furnish all the labor necessary for the painting of the above described house, and of another house owned by Charlotte A. Cochran, which was at the same time being built by W. M. Bell upon premises other than those above described, for all of which affiant was to receive the sum of \$380; that the material furnished and labor performed upon the above described dwelling house belonging to the said Elmer G. Cochran amounted in the aggregate to the sum of \$177.50, of which amount affiant has been paid the sum of \$115, leaving a balance due thereon of \$62.50; for which amount, with interest at the rate of seven per cent per annum from the 26th day of September, 1889, at which time the painting of the house was completed, affiant, by virtue of the statutes of Nebraska in such case made and provided, claims a lien upon the above described premises and the building thereon belonging to Elmer G. Cochran."

To this answer and cross-petition Elmer G. Cochran filed answer as follows:

"The defendant Elmer G. Cochran, for his answer to the cross-petition of John A. Fuller & Co., denies each and every allegation contained in said cross-petition, except the description and ownership of the premises and the contract between W. M. Bell and this defendant."

The case was dismissed without prejudice as to W. M. Bell, the contractor. Hines was not served. A trial was had, and findings made, and decree entered, in favor of plaintiff and Fuller & Co., foreclosing their liens and ordering sale of the property, to which the Cochrans excepted, and bring the case here on appeal.

The proceedings at the opening of the trial of the case in the court below, in regard to the lien of plaintiff and the

evidence introduced as to his lien, were very short, and I think it best to give them here in full:

"On motion of plaintiff, the case is dismissed without prejudice as to defendant W. M. Bell.

"Defendants Cochran move to dismiss the action, for the reason that contractor W. M. Bell is not a party. Motion overruled. The defendants except.

"Defendants Cochran and wife object to the introduction of any evidence in the case, for the reason that the plaintiff's petition does not state a cause of action against either of them. Objection overruled. Defendants Cochran except.

"Plaintiff, on motion, is allowed to amend petition, to which defendants Cochran except.

"Byron G. Burbank, sworn for plaintiff and examined by Mr. Yeiser, testified as follows:

"Q. I will ask you if you are acquainted with the signature of William Bell, and if this is his signature (handing witness paper)?

"A. I am acquainted with his signature to this extent: I have seen him write his name, and I believe this to be his signature.

"Plaintiff offers in evidence paper identified by witness, same purporting to be an order given by Mr. W. M. Bell on E. G. Cochran to pay amount due. Paper marked 'Exhibit A.'

"Plaintiff also offers in evidence his original mechanic's lien in this case. Same marked 'Exhibit B.'

"Objected to by defendants Cochran, for the reason that it is not a sworn statement of the amount due. Objections overruled. Defendants Cochran except.

"Plaintiff rests.

"Defendants Cochran move the court to dismiss the case, for the reason that the plaintiff has proved no cause of action. Motion overruled. Defendants Cochran except."

It will be noticed that the affidavit of plaintiff was

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made, according to venue, in Webster county, Nebraska, and the notary states in the jurat that the affidavit was sworn to before him as notary public in and for the county and state aforesaid. The seal impression which he attached is apparently the seal of the notary who signed the jurat, or at least has his name upon its face, the words "notarial seal" and "Douglas county, Nebraska." If the affidavit was made and oath taken, as shown by its face, in Webster county, Nebraska, but before a notary public of Douglas county, Nebraska, as the impression of the seal shows, would the filing of such an affidavit fulfill the requirements of the mechanics' lien law that a sworn statement shall be filed? The Compiled Statutes of Nebraska, 1893, page 597, section 5, provide as follows: "Each notary public, before performing any duties of his office, shall provide himself with an official seal, on which shall be engraved the words 'notarial seal,' the name of the county for which he was appointed and commissioned, and the word 'Nebraska,' and in addition, at his option, his name and the date of expiration of his commission or the initial letters of his name, with which seal, by impression, all his official acts as notary public shall be authenticated." The next section (6), on same page, provides: "Every person, during the term of his office, so appointed, commissioned and qualified to the office of notary public, is hereby authorized and empowered, within the county for which he was appointed to such office, to administer oaths and affirmations in all cases." It is clear from the last section that a notary is only authorized and empowered to act in administering oaths and affirmations within the county for which he was appointed and commissioned notary, and from the former section it is just as plain that each official act of such notary, each affidavit made before him, must be authenticated by his official seal. The plaintiff was required by the law, under and by virtue of which he sought to establish and perfect his lien, to file a sworn statement, and I do not

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think it can be said that he has done so. His failure to do so was fatal to his claim of lien. If the conclusion is that the notary was of Douglas county, then the recitals of the affidavit show that he was acting in Webster county. His acts would be of no avail and not entitled to recognition, or to be introduced in evidence.

The objection that the affidavit of service of summons has no venue, is well taken. "An affidavit should show on its face that it was taken within the officer's jurisdiction." (*Blair v. West Point Mfg. Co.*, 7 Neb., 147; *Davis v. Rich*, 2 How. Pr. [N. Y.], 86; *Sandland v. Adams*, 2 How. Pr. [N. Y.], 127; *Snyder v. Olmsted*, 2 How. Pr. [N. Y.], 181.) In the case at bar, a fair conclusion from the face of the recitals of the affidavit is that it was taken without the notary's jurisdiction, and for this reason it was invalid and was not a verification of the lien. If on the other hand it is claimed, or can be said, that the face of the affidavit shows that the officer was a notary in and for Webster county, then the seal used, not being his proper seal, would leave the affidavit as though no seal had been attached and without the authentication required by law, which would be fatal to it as a sworn statement of a claim for lien. Our statute requires a sworn statement to be filed. "Where a statute declares that the notice to create a lien 'shall be verified' before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim and cannot be amended." Phillips, *Mechanics' Liens* [2d ed.], sec. 336, p. 597; *Colman v. Goodnow*, 36 Minn., 9, 29 N. W. Rep., 338; *Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. M., 256, 5 Pac. Rep., 725; *Minor v. Marshall*, 27 Pac. Rep. [N. M.], 481; *Gates v. Brown*, 25 Pac. Rep. [Wash.], 914; *Stetson & Post Mill Co. v. McDonald*, 32 Pac. Rep. [Wash.], 108.)

The only evidence introduced by plaintiff was contained

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in exhibits "A" and "B," "A" being the order given by W. M. Bell to plaintiff on E. G. Cochran, and "B" the lien, or claim of lien, as filed and recorded. Under the issues joined in the case between the plaintiff and principal defendants, Cochran, this was clearly insufficient to entitle the defendant to a decree for the foreclosure of the lien. The account and affidavit filed in the clerk's office were evidence only of the facts that they were filed within the time required by law and of their own contents as touching their sufficiency. (*Hassett v. Curtis*, 20 Neb., 162.) The cross-petitioners, J. A. Fuller & Co., are assignees of the claim or lien of Johnson, who, as appears from the record, was a painter and contractor with Bell & Hines, the original contractors, to paint the house in question in this case, and another one belonging to another person and situated on a different lot and in no way connected with the one in suit. He agreed to paint the two for a lump sum of \$380, and apportioned it according to his own judgment or opinion, and filed his claim of lien for what he states therein is a balance due, giving no items. His evidence bearing upon the question of the labor performed and materials used in the painting of this house is as follows:

Q. What did you do, Mr. Johnson, after the execution of that paper?

A. I painted two houses for the sum of \$380.

Q. According to the plans and specifications?

A. Yes, sir.

Q. What would be a fair proportion of the charge for these houses, for doing the painting on this house in question?

Objected to, as incompetent, immaterial, and irrelevant. Objection overruled. Defendants Cochran except.

A. \$177.50.

Q. When did you finish the painting of this house?

A. The 26th of September, 1889.

Q. On that contract, how much has been paid?

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A. There has been \$115 paid.

Q. How much were you paid in all of that \$380.

A. \$230.

Q. Of that \$230, one-half was applied on one house and one-half on the other?

A. Yes, sir.

Cross-examination, by Mr. Cochran :

Q. You have stated that the fair valuation of the labor and materials which you put on this house was a certain amount. How do you know that?

A. Well, I can tell very near.

Q. How do you make that estimate? How do you know that it is a fair value for the labor and materials that went into this building?

A. I can tell that by the amount of work there is to a building of that size.

Q. How do you make your estimate as to the value of the labor and materials that were put into this house?

A. I make it this way: This house is not as big as the other one, and there is not as much work or material required on it as the other one. So as near as I can judge, there is that much difference.

Mr. Montgomery : Twenty-five dollars?

A. Yes, sir.

Mr. Cochran : How much painting material did you use on this house? How much oil did you use there?

A. Well, I can't give the exact amount of oil I used there.

Q. What other materials did you use?

A. I used white lead and different colors.

Q. How much white lead did you use in painting this house?

A. I couldn't give any exact amount.

Q. How much of what you call colors did you use as coloring materials in that house?

A. I couldn't say just exactly how much I did use.

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Q. How many days' work did you put in on this house?

A. Well, I couldn't say just how many days.

Q. You went back and forth between the two houses, according as the work was done on the two places?

A. Yes, sir.

Q. You sometimes worked part of a day on one and part of a day on the other?

A. Yes, sir.

The Court: How much were you to have for painting both of these houses?

A. I was to get \$380.

Q. You think this house in question is not quite so large as the other?

A. Yes, sir.

Q. Have you not charged quite one-half on this?

A. No, sir.

Q. But when you got \$230 you credited one-half on each house, without regard to size?

A. Yes, sir.

The contracts for the erection of the two houses were separate agreements with the owners of the lots respectively and had no connection in any manner. Some authorities hold, under a state of facts similar to those in this case, no claim for lien could be filed or enforced. In our state, where houses were erected for one owner upon three adjoining lots under entire contract, it was held that the cost and expense of erecting all the houses would be apportioned among the lots according to the value of the labor and materials expended upon each. (*Doolittle v. Plenz*, 16 Neb., 153.) I am inclined to the opinion that Johnson had the right to file his lien, and it could be enforced against each lot and house for the value of labor performed and materials furnished and used on each house, but in the evidence now given in support of the lien filed by Johnson (now owned by Fuller & Co.) there is no attempt made to show what was the value of either the labor or materials,

except that Johnson says he estimates it by looking at the houses, and as one is smaller than the other, he apportions and charges against it the smaller sum, making an approximation or only a guess. On cross-examination he states that he cannot tell how many days' labor was performed on this house and does not know how much paint and color was used. There is no valuation of any labor or materials shown, and all that is shown is that the price for painting the two houses, agreed upon between the original contractor and the subcontractor, was divided according to an estimate made by the subcontractor in the manner before stated and a claim of lien filed for a balance due on the same. It would have been no hardship for the subcontractor to have kept an account of the labor performed and materials furnished on each house in order to have some certain basis for his claim of lien. The cross-petitioners failed to prove facts necessary to establish their lien or to support the decree in their favor. The agreement between the contractor and subcontractor is not the measure of the owner's responsibility or liability; his building and premises are bound for no more than the value of the work done and materials furnished by the subcontractor. (*Gray v. Dick*, 97 Pa. St., 142; 2 Jones, Liens, sec. 1416.) The decree of the district court is set aside, the decision reversed, and judgment ordered in this court for the principal defendants as to both claims.

DECREE ACCORDINGLY.

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CRANE COMPANY V. CHRISTIAN SPECHT.

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FILED FEBRUARY 6, 1894. No. 5713.

1. A contract of guaranty entered into with one person or corporation cannot be extended to another person or corporation.
2. A contract of guaranty will be strictly construed and the

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guarantor held bound only according to the terms of the instrument containing his contract, and the terms of the contract will not be extended by implication or otherwise, nor will evidence be received to vary its terms or meaning when it is not in any sense or portion ambiguous or uncertain.

3. **Construction of Contract of Guaranty.** Where S. guarantied the account of L. with the C. Bros. Mfg. Co., a corporation, for goods supplied and to be furnished by it to L., and the corporation afterward changed its name to Crane Company, and after the change furnished goods to L., *held*, in an action by the Crane Company on the guaranty to recover the value of such goods, that S. was not bound.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*Cavanagh, Thomas & McGilton*, for plaintiff in error:

The mere change of the name of a corporation does not affect its rights, property, or credits. (*Rosenthal v. Madison & Indianapolis Plank Road Co.*, 10 Ind., 358; *Town of Reading v. Wedder*, 66 Ill., 80; *Chiles v. Bridges' Heirs*, Litt. Sel. Cas. [Ky.], 420; *Trustees of Northwestern College v. Schwagler*, 37 Ia., 577; *Morris v. St. Paul & C. R. Co.*, 19 Minn., 528; *Trustees of University of Alabama v. Moody*, 62 Ala., 389.)

After change of name, all actions on old obligations must be brought in new name. (*Mayor v. Seaber*, 3 Burr. [Eng.], 1866; *Scarborough v. Butler*, 3 Lev. [Eng.], 237; *Sunapee v. Eastman*, 32 N. H., 470; *Cotton v. Mississippi & Rum River Boom Co.*, 22 Minn., 372; *Pape v. Capitol Bank of Topeka*, 20 Kan., 440.)

Change in name of a corporation does not abate a suit. (*Thomas v. Frederick County School*, 7 Gill & J. [Md.], 369.)

*Wharton & Baird*, contra:

A contract of guaranty or letter of credit binds the maker only in accordance with the strict letter of the con-

tract, and any variation, no matter whether such variation enlarges or contracts the liability of the guarantor, will be sufficient to release the guarantor from any liability, and courts will not enter into the question as to whether or not the liability of the guarantor has been increased or decreased by reason of the change. (*Birckhead v. Brown*, 5 Hill [N. Y.], 641; *Robbins v. Bingham*, 4 Johns. [N. Y.], 475; *Dobbin v. Bradley*, 17 Wend. [N. Y.], 422; *Sollee v. Meugy*, 1 Bailey Law [S. Car.], 620; *Pemberton v. Oakes*, 4 Russell [Eng.], 154; *Taylor v. McClung*, 2 Houston [Del.], 24.)

HARRISON, J.

In this case, an action in the district court of Douglas county, Nebraska, the plaintiff the Crane Company, plaintiff in the court below and in this court, sought to recover of defendant Christian Specht a certain sum which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company. The petition of plaintiff is as follows:

"The plaintiff in the above entitled cause, complaining of defendant therein, for a cause of action states that said plaintiff is a corporation duly organized under the laws of the state of Illinois; that on and prior to August 23, 1889, Crane Bros. Manufacturing Company was a corporation organized and doing business under the laws of the state of Illinois, and was engaged in the sale of plumbing and other materials in the city of Omaha, Nebraska. That prior to said August 23, 1889, said Crane Bros. Manufacturing Company had sold and furnished to one A. C. Lichtenberger goods and materials; that for said goods said Lichtenberger was indebted to said Crane Bros. Manufacturing Company, and at said date said Crane Bros. Manufacturing Company refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods

thereafter delivered, should be guarantied by some responsible party; that in consideration of Crane Bros. Manufacturing Company's selling additional goods to said Lichtenberger, said defendant Christian Specht executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Company and the payment of all materials which said Lichtenberger should thereafter purchase of them; that thereafter said Crane Bros. Manufacturing Company, relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials,—a copy of said guaranty is hereto attached, marked Exhibit 'A,' and made a part of this petition; that afterwards the said plaintiff became incorporated and succeeded to the business and interests of said Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company; that, relying upon said guaranty made by said Christian Specht to said Crane Bros. Manufacturing Company, said plaintiff sold and furnished said Lichtenberger goods and materials; that said sales made by plaintiff to said Lichtenberger were made with the knowledge and consent of said defendant and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger under said guaranty to said Crane Bros. Manufacturing Company, and that said goods were furnished by said plaintiff relying upon said guaranty and at the request of said defendant that said goods should be so furnished; that a statement of said goods furnished by said Crane Bros. Manufacturing Company, and said plaintiff to said Lichtenberger in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit 'B,' and made a part hereof; that on account of goods so furnished there remains now due said plaintiff the sum of eight

hundred eighty-one dollars and ninety-nine cents (\$881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore the plaintiff demands judgment against said defendant in the sum of one thousand dollars (\$1,000), and the costs of suit."

The defendant answers the petition as follows:

"First—That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies the same.

"Second—The defendant, further answering, admits that the Crane Bros. Manufacturing Company sold and furnished to the said A. C. Lichtenberger on or about August 23, 1889, some goods and merchandise; and further admits that on the 23d day of August, 1889, he executed the guaranty mentioned in the petition, of which Exhibit 'A' is a copy.

"Third—This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company, and cannot admit, and therefore denies the same.

"Fourth—The defendant, further answering, denies that the plaintiff sold and furnished said Lichteuberger goods and materials as alleged in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said Lichtenberger, or ever in any manner whatever agreed to become liable for the same, and denies that there is due the plaintiff the sum of \$881 from said Lichtenberger, or any part thereof.

"And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

"Wherefore the defendant, having fully answered said

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petition, prays to be hence dismissed with his reasonable costs."

Exhibit "A," the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

EXHIBIT "A."

"OMAHA, NEB., August 23, 1889:

"*Messrs. Crane Bros. Manufacturing Company, City.*—  
GENTLEMEN: I will guaranty the payment of your account against A. C. Lichtenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me.

"Yours truly,

C. SPECHT."

A jury was waived and trial had to the court. There was a finding and judgment in favor of defendant. Plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review.

The evidence in the case discloses that on the 23d day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question (Exhibit "A"); that on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company, no change or alteration whatever being at this time made in the officers, management, business, or location of place of business, and after such change continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger failed to pay; that defendant Specht was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty; that the action is brought upon the account running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new name, for a balance due upon the account which is due for goods

sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions and strenuously argued by counsel is, can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of the same persons, managed by the same officers, engaged in the same business and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to "Crane Company." The contention in the case resolves itself to the question, did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guaranteed to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty and the construction to be given to it.

In 1 Brandt, Suretyship & Guaranty [2d ed.], pp. 134 and 135, sec. 93, it is said, in discussing such contracts: "A rule never to be lost sight of in determining the liability of a surety or guarantor is, that he is a favorite of the law and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule

universally recognized by the courts, and is applicable to every variety of circumstances." Again it is said: "A surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. \* \* \* The guarantor is only liable because he has agreed to become so. He is bound by his agreement and nothing else. \* \* \* It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him."

In *Miller v. Stewart*, 9 Wheat. [U. S.], 680, Story, J., says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or even that it may be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass now to some of the cases in which these rules have been particularly applied to the facts as developed in the cases, selecting such as are similar to the one under consideration and more or less directly in point.

In the case of *Allison v. Rutledge*, 5 Yerg. [Tenn.], 194, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of

some bacon purchased by one Cooper, and was sued on the instrument by John and Joseph Allison, as guarantor, for \$100, the price of the bacon. Catron, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutledge undertook for the debt of Cooper, is bound by the writing and this only. The contract cannot be varied or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of *Smith v. Montgomery*, 3 Tex., 199, the defendant Montgomery wrote and forwarded a letter of credit as follows:

"COLORADO, Dec. 27, 1839.

"*Col. Smith & Pilgrim*—GENTLEMEN: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid as far as to the amount of (\$3,000) three thousand dollars,

"And much oblige yours, with respect,

"JAMES S. MONTGOMERY."

This letter was addressed on the back to Smith alone. It appears that Smith and Pilgrim had been partners in business, but a very short time prior to the date of the letter had dissolved the partnership. The letter being addressed on the back to Smith alone, was delivered to him and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Mr. Justice Wheeler, in delivering the opinion of the court, says: "Upon consideration, we are all of the opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its

application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from ambiguity, we must take that as the certain criterion to determine its application without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. (1 How., 169.) But when the contract upon its face is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face of the instrument. \* \* \* It is a well settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot be extended by implication or otherwise beyond the actual terms of his engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In the case of *Evansville National Bank of Evansville, Ind., v. Kaufman*, 93 N. Y., 273, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed."

"Guarantor liable only to person to whom he makes the guaranty." (*Second Nat. Bank of Peoria v. Diefendorf*, 90 Ill., 396.)

A guarantor's engagement does not make him answer-

able for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement. (*Walsh v. Bailie*, 10 Johns. [N. Y.], 179; *Penoyer v. Watson*, 16 Johns. [N. Y.], 99.)

“Where a letter of credit is addressed to a particular firm no one else can rely on it as a guaranty.” (*Taylor v. Wetmore*, 10 O., 491.)

In *Barnes v. Barrow*, 61 N. Y., 39, it being a case in which, under a written contract of guaranty made with a particular person, a partnership of which that person was a member sought to recover the value of goods furnished the person for whose debt or default the guarantor stood charged to answer, it is said: “On the face of this contract it is plain that no one could act upon it, except the persons named in it.” And Burge on Suretyship (ch. 3) is cited as follows: “The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included, in it.” And further it is stated: “In the Roman law the rule now under consideration assumes the form of a maxim: ‘An agreement of guaranty made with one person cannot be extended to another person.’”

To the same effect as the above cases is that of *Taylor v. McClung's Executor*, 2 Houston [Del.], 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of *Lee v. Hastings*, 13 Neb., 508.

The case most directly in point is that of *Grant v. Naylor*, 4 Cranch [U. S.], 205. In this case John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty which was addressed to John and Joseph Naylor. Chief Justice Marshall in the opinion in the case says: “That the letter was really designed for

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John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. \* \* \* On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co., to either of which this letter might have been delivered. \* \* \* In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than courts have ever gone, where the writing is itself a contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

In the case at bar the defendant Specht addressed the letter, or contract of guaranty sued upon, to the Crane Bros. Manufacturing Company, and not to the Crane Company. At the time the contract was entered into there was no such corporation in existence as the Crane Company. The contract of guaranty made by Specht was not in any manner for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and when not uncertain, indefinite, or ambiguous, will not be extended in any par-

ticular beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation from Crane Bros. Manufacturing Company to Crane Company was made there was no notice given defendant that such change had been made. The change could not and did not pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which, under certain circumstances as to assignment, and possibly without, would be a different case and raise another point or question. The instrument containing the guaranty was plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second, and the introduction of the letter, showing as it does the guaranty to the Crane Bros. Manufacturing Company, was not competent to, and does not, support the action on the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that the Crane Company had the same officers, and was, under the same management, engaged in the same business and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action.

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At the time the goods were furnished to Lichtenberger there was no Crane Bros. Manufacturing Company. It had ceased to exist or had become, by change of name, the Crane Company, and Specht could rely upon the exact terms of his contract and demand that his rights and liability be measured by the guaranty as written, signed, and delivered by him, to be bound only for goods furnished to Lichtenberger by the Crane Bros. Manufacturing Company as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right and is

AFFIRMED.

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LOUIS SCHROEDER, TRUSTEE, APPELLEE, V. PERLIA J.  
WILCOX ET AL., APPELLANTS.

FILED FEBRUARY 6, 1894. No. 5294.

1. **Administrator's Sale of Realty: JUDGMENTS: COLLATERAL ATTACK.** When an administrator's petition for authority to sell real property of the decedent for the payment of his debts was duly filed in the district court of the proper county and due notice of such application was published as prescribed by the order made upon the presentation of such application, the district court obtained such jurisdiction of the subject-matter for the purposes of the application referred to, as that its judgment or order is not subject to attack or question in a collateral action.
2. ———: ———: ———: **EVIDENCE OF PUBLICATION.** Where the order of the court required publication of notice of an application to sell real property to be made in a newspaper designated by name, it was proper, as against a collateral attack upon the order finally made, to show by competent evidence, independently of the record, that the publication was in fact made in strict accordance with the requirements of the said order of the court.

3. **Wills: POWER OF EXECUTOR TO SELL REAL ESTATE.** Under a will which required payment of the debts of the decedent and the distribution, in a manner designated, of the balance which should remain of the proceeds of the sale of certain described real estate of the testator, without any designation of the person by whom such sale was to be made, the executor had power to sell and make conveyance of the said real estate independently of any order of court authorizing or confirming such sale or deed.
4. **Sales of Realty by Administrator Where Executor Named in Will Fails to Qualify.** A sale and conveyance of real property which might properly have been made by an executor named in the will had he qualified, may be made by an administrator with the will annexed appointed upon the refusal of the party named as executor to qualify as such, where the proceeds of the sale of the real property are directed by the terms of the will to be used in making payment of the indebtedness of the testator, the balance remaining to be distributed equally among legatees clearly designated,—the will indicating no special confidence of the testator in the person therein named as executor.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The opinion contains a statement of the case.

*Breckenridge, Breckenridge & Crofoot*, for appellants:

The word "heirs," as used in the will, was intended to mean, and does mean, children. (*Barton v. Tuttle*, 62 N. H., 558; *Moore v. Lewis*, 4 O. Circuit Court, 284; *Davis v. Davis*, 39 N. J. Eq., 14; *Jarvis v. Quigley*, 10 B. Mon. [Ky.], 106; *Haley v. Boston*, 108 Mass., 579; *Haverstick's Appeal*, 103 Pa. St., 394; *Hinton v. Milburn*, 23 W. Va., 166; *Beatty v. Trustees Cory Universalist Society*, 39 N. J. Eq., 463; *Bailey v. Patterson*, 3 Rich. Eq. [S. Car.], 156; *Williamson v. Williamson*, 18 B. Mon. [Ky.], 370; *Bowers v. Porter*, 4 Pick. [Mass.], 210; *King v. Beck*, 15 O., 559.)

The will does not convey the title to any of the land to the executor. The title could not rest in abeyance. It

must have vested at once upon the death of the testator in the children of J. K. Saunders and Perlia J. Wilcox. (*Nicoll v. Scott*, 99 Ill., 529; *Wilson v. White*, 109 N. Y., 59; Jarman, Wills, pp. 436, 407, 408, note; *Beadle v. Beadle*, 2 McCrary [U. S.], 586; *Herbert v. Smith*, 1 N. J. Eq., 141; *Scott v. Monell*, 1 Redfield [N. Y.], 431; *Romaine v. Hendrickson's Executors*, 24 N. J. Eq., 231; *Hampton v. Shotter*, 8 Adol. & E. [Eng.], 905.)

The will did not give the executor named therein power to sell real estate. To confer power to sell lands under a will, express and unequivocal words are necessary. (*Fell v. Young*, 63 Ill., 106; *Buckner v. Cromie*, 5 Bush [Ky.], 603; *Skinner v. Wood*, 76 N. Car., 109; *Bell's Appeal*, 66 Pa. St., 498; *Gay v. Grant*, 8 S. E. Rep. [N. Car.], 100; *Dill v. Wisner*, 88 N. Y., 154; *In re Fox's Will*, 52 N. Y., 537; *Owen v. Ellis*, 64 Mo., 77; *Hopkins v. Van Valkenburgh*, 16 Hun [N. Y.], 3.)

If the will had given the executor who failed to qualify power to sell real estate, the power would not devolve upon the administrator *cum testamento annexo*. (*Lockwood v. Sturdevant*, 6 Conn., 374; *Warnecke v. Lembca*, 71 Ill., 92; *Tippett v. Mize*, 30 Tex., 362; 2 Williams, Executors [6th Am. ed.], p. 1011; *Berger v. Duff*, 4 Johns. Ch. [N. Y.], 368\*; *Naundorf v. Schumann*, 41 N. J. Eq., 14; *Gay v. Grant*, 8 S. E. Rep. [N. Car.], 100; *Wills v. Courper*, 2 O., 124; *Hodgin v. Toler*, 70 Ia., 21; *Nicoll v. Scott*, 99 Ill., 529; *Dunning v. Ocean Nat. Bank of New York*, 61 N. Y., 497; *Brown v. Hobson*, 3 A. K. Marshall [Ky.], 380; *Varde-man v. Ross*, 36 Tex., 111; *Belcher v. Branch*, 11 R. I., 226; *M'Donald v. King*, 1 N. J. Law, 432; *Conklin v. Egerton's Administrator*, 21 Wend. [N. Y.], 430; *Knight v. Loomis*, 30 Me., 204; *Ross v. Barclay*, 18 Pa. St., 179; *Dominick v. Michael*, 4 Sandf. [N. Y.], 374; *Beekman v. Bonsor*, 23 N. Y., 303; *Hall v. Irwin*, 2 Gil. [Ill.], 176; *In re Besley's Estate*, 18 Wis., 477.)

The granting of license to an administrator to sell real

estate is a special proceeding only authorized by statute, which must be strictly followed. Such proceeding is unknown to the common law. If the statute were not strictly complied with, the proceedings were void. (*Bloom v. Burdick*, 1 Hill [N. Y.], 139; *Striker v. Kelly*, 7 Hill [N. Y.], 25; *Foster v. Glazener*, 27 Ala., 391; *Thatcher v. Powell*, 6 Wheat. [U. S.], 119; *Ludlow v. Johnson*, 3 O., 553; *Knox v. Jenks*, 7 Mass., 488; *Fell v. Young*, 63 Ill., 106; *Wright v. Edwards*, 10 Ore., 298; *Corwin v. Merritt*, 3 Barb. [N. Y.], 311.)

There are no presumptions in favor of the jurisdiction, even in courts of general jurisdiction, where they are acting under a special statute and not according to the course of the common law. (*Morse v. Presby*, 26 N. H., 302; *Carleton v. Washington Ins. Co.*, 35 N. H., 167; *Galpin v. Page*, 18 Wall. [U. S.], 350; *Edmiston v. Edmiston*, 2 O., 251; *Furgeson v. Jones*, 20 Pac. Rep. [Ore.], 843; *Donlin v. Hettinger*, 57 Ill., 348.)

Void judgments may be attacked either directly or collaterally, in any proceeding where any one is claiming anything under them. (*People v. Eggleston*, 13 How. Pr. [N. Y.], 123; *Camden v. Haymond*, 9 W. Va., 680; *Condry v. Cheshire*, 88 N. Car., 375; *Morris v. Hogle*, 37 Ill., 150; *Cain v. Goda*, 84 Ind., 209; *Morris v. Halbert*, 36 Tex., 19; *Martin v. Judd*, 60 Ill., 78; *Edwards v. Whited*, 29 La. Ann., 647; *Lyles v. Bolles*, 8 S. Car., 258; *Borden v. Fitch*, 15 Johns. [N. Y.], 141; *Morse v. Presby*, 26 N. H., 302; *Furgeson v. Jones*, 20 Pac. Rep. [Ore.], 843; *Mills v. Paynter*, 1 Neb., 446.)

The record in the license case shows affirmatively a want of jurisdiction. The record introduced in evidence by the plaintiff showed that the order to show cause was directed to be published in the *Nebraska Watchman*, and the recitals are that it was published in the *Omaha Republican*. If the want of jurisdiction appears affirmatively by the record, it is fatal to the proceedings. (*Blodgett v. Hitt*, 29 Wis., 169.)

In the application for license the heirs and devisees, and all persons interested, must have been served with notice of such application. The service of the order to show cause was jurisdictional, without which all the proceedings were void. (*Smith v. Meyers*, 5 Blackf. [Ind.], 223; *Overstreet v. Davis*, 24 Miss., 393; *North v. Moore*, 8 Kan., 143; *Tyler v. Peatt*, 30 Mich., 63; *In re Mahoney*, 34 Hun [N. Y.], 501; *Hamilton v. Lockhart*, 41 Miss., 460; *Gulley v. Macy*, 81 N. Car., 357; *Marshall v. Rose*, 86 Ill., 374; *Gibbs v. Shaw*, 17 Wis., 204; *White v. Jones*, 38 Ill., 159; *Windsor v. McVeigh*, 93 U. S., 274; *Johns v. Northcutt*, 49 Tex., 444; *Hale v. Finch*, 104 U. S., 261; *Morris v. Hogle*, 37 Ill., 150; *Guy v. Pierson*, 21 Ind., 18; *O'Dell v. Rogers*, 44 Wis., 136; *Wilson v. White*, 109 N. Y., 59; *Mickel v. Hicks*, 19 Kan., 578; *Fell v. Young*, 63 Ill., 106; *Donlin v. Hettinger*, 57 Ill., 348.)

*John W. Lytle*, also for appellants.

*Edward W. Simeral*, contra:

The power under the will is sufficient to authorize the executor to sell without first obtaining an order of the court. (*Little v. Giles*, 25 Neb., 331; *Peter v. Beverly*, 10 Pet. [U. S.], 532\*; *M'Donald v. Hewett*, 15 Johns. [N. Y.], 349; *Lippincott v. Lippincott*, 19 N. J. Eq., 121; *Rankin v. Rankin*, 36 Ill., 293; *Gray v. Henderson*, 71 Pa. St., 368; *Lindley v. O'Reilly*, 50 N. J. Law, 636.)

The power in the will was ample to vest in the executor the right to sell by virtue of his office. It follows, as a necessary conclusion, that the administrator with the will annexed, under the statutes of this state, will have the same power. (Secs. 169, 173, 190, ch. 23, Comp. Stats.; *Drummond v. Jones*, 44 N. J. Eq., 53; *Vernor v. Coville*, 54 Mich., 281; *Davis v. Hoover*, 112 Ind., 423; *Mott v. Ackerman*, 92 N. Y., 539; *Greenland v. Waddell*, 116 N. Y., 234; *In re Christie*, 59 Hun [N. Y.], 153; *Evans v.*

*Chem*, 71 Pa. St., 47; *Peebles v. Watts*, 9 Dana [Ky.], 103; *Watson v. Martin*, 75 Ala., 506; *Sandifer v. Grantham*, 62 Miss., 412; *Joralemon v. Van Riper*, 44 N. J. Eq., 299; *Putnam v. Story*, 132 Mass., 205; *Saunders v. Saunders*, 12 S. E. Rep. [N. Car.], 909; *Drayton v. Grimke*, 1 Bailey Eq. [S. Car.], 392.)

The testimony established the fact that the license was published as ordered. The appellee proved that all the prerequisites of jurisdiction were strictly complied with. The district court acquired jurisdiction over the minor children in the license case. (*Stanley v. Noble*, 59 Ia., 666; *Mohr v. Manierre*, 101 U. S., 417; *Equitable Life Assurance Society of the United States v. Laird*, 24 N. J. Eq., 319; *Britton v. Larson*, 23 Neb., 806.)

Proceedings for sale of realty by administrators are actions *in rem*, and every presumption is in favor of the correctness and regularity of judgments of courts of general jurisdiction acting within the powers prescribed by statute. Such judgments are not open to collateral attack. (*Grignon's Lessee v. Astor*, 2 How. [U. S.], 319; *McClay v. Foxworthy*, 18 Neb., 295; *Stack v. Royce*, 34 Neb., 833; *Seward v. Didier*, 16 Neb., 64; *Saxon v. Cain*, 19 Neb., 488; *Miller v. Sullivan*, 4 Dillon [U. S.], 341; *McNitt v. Turner*, 16 Wall. [U. S.], 352; *Bunce v. Bunce*, 59 Ia., 533.)

#### RYAN, C.

Prior to October 19, 1882, Platt Saunders was the owner of a tract of land south of and near the city of Omaha, known as the "Platt Saunders ten-acre tract." About the 13th of October, 1882, the said Platt Saunders executed a will, and on October 19, 1882, died, leaving no widow and leaving as his only children one son, John K. Saunders, and one daughter, Mrs. Perlia J. Wilcox, both of whom were then married and each had living children, which fact was known to said Platt Saunders when he made

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his said will. The following is a copy of the will in question.

"I, Platt Saunders, of Douglas precinct, Douglas county, state of Nebraska, market gardener, make this my last will. I give and devise all my real estate as follows, that is to say: Commencing on the north side at the middle of the Bellevue road of the Platt Saunders ten-acre tract homestead, as recorded in the county treasurer's book of Douglas county, Nebraska, and running due south fifteen rods along the middle of said road; thence in a southwesterly direction twenty rods; thence north, parallel with the Bellevue road, fifteen rods; thence east along the north line of the said Platt Saunders ten-acre homestead to the place of beginning. And this shall be my last will and wish that my son, John K. Saunders, shall have and hold the above described land, together with all the appurtenances and improvements thereon, so long as he shall live, and at his death the said property shall be sold to the best advantage and the proceeds equally divided among his heirs.

"Furthermore, commencing fifteen rods from the north line at the middle of the Bellevue road on the Platt Saunders ten-acre homestead as recorded in the county treasurer's book for Douglas county, Nebraska, and running due south fifteen rods; thence in a southwesterly course ten rods; thence north, parallel with the Bellevue road, fifteen rods; thence east to the place of beginning. And this shall be my last will and wish that my daughter, Perlia J. Wilcox, shall have and hold the above described land, together with all the appurtenances and improvements thereon, so long as she shall live, and at her death the said property shall be sold to the best advantage and the proceeds be divided equally among her heirs.

"And, furthermore, all the residue of the said ten acres shall be sold to the best advantage, and after paying all the lawful debts of the said Platt Saunders, the remaining proceeds shall be divided between the heirs of the said John K. Saunders and Perlia J. Wilcox.

"And, furthermore, I hereby appoint and empower T. J. Torrey, of Valley precinct, Douglas county, Nebraska, to be my executor without bonds, and trust that this my last will shall faithfully and impartially be executed, and that all lands and money shall be given to their legal owners, and all money to be paid over as fast as received by said executor.

"In witness whereof, I have hereunto signed and sealed this instrument, and publish the same, as and for my last will, at Valley precinct, Douglas county, state of Nebraska, this 13th day of October, 1882.

(Duly witnessed.)

"PLATT SAUNDERS."

T. J. Torrey, who was named as executor, refused to qualify in accordance with the terms of the will. Afterwards E. V. Smith was appointed administrator with the will annexed, and took upon himself the discharge of the duties imposed by the will. There were sufficient claims filed and allowed as valid debts against the estate of Platt Saunders to more than require in payment all of his personal property. Thereupon the said E. V. Smith, administrator with the will annexed, undertook to, and in so far as he had the power did, sell on July 17, 1883, to John A. McShane that portion of the ten-acre tract designated as "all of the residue." Throughout the presentation of this case the two tracts described in the will by metes and bounds are treated together as constituting the four-acre tract, "the residue," as it is called in the will, of course constituting the six-acre tract, by which distinctions frequent reference will hereinafter be made to the tracts designated. The sale of this latter (the six-acre tract) did not afford means sufficient, together with the personal property, to pay the debts of the decedent. Thereupon, E. V. Smith, the administrator, applied to the district court of Douglas county, Nebraska, for license to sell the remaining four acres for the purpose of paying the balance of said debts. This license was granted and the four acres were sold Oc-

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tober 17, 1885, for a considerable sum more than sufficient to pay all the remaining debts and expenses of administration. John A. McShane was also the purchaser of this tract. The plaintiff in this action obtained title as trustee through McShane, and on October 16, 1889, commenced proceedings to quiet title against the defendant. December 5, 1890, John K. Saunders filed in the district court of Douglas county, Nebraska, his petition against Louis Schroeder, who was known as the plaintiff herein, and a large number of other defendants supposed to be making some claim to the property through or under McShane or this plaintiff, the said Saunders by his petition claiming an interest in said property, and asking the court to set aside and cancel the said administrator's deeds, etc. This last action was by order of the court on February 21, 1891, consolidated with the cause now under consideration, and was ordered to be tried with it. At the February term, 1891, of the district court of Douglas county a trial was had, and in November, 1891, a decree was rendered in favor of the plaintiff quieting his title, from which the defendants prosecute their appeal to this court.

The appellants claim that said sales by E. V. Smith, administrator, were without authority, and were, therefore, null and void, and that the defendants have an interest in said property unaffected by the sales referred to. The amount realized upon each of these sales is tendered in court, with the interest thereon accrued up to the time of the commencement of this suit. The appellants very strenuously insist that the word "heirs," as used in the will of Platt Saunders, should be treated as synonymous with the word "children." This contention is supplemented with the further claim that the will by its terms having provided that as to the four-acre tract a life estate should exist in favor of the parties named, and furthermore, that the six-acre tract being simply charged with the payment of debts, and that the proceeds of the residue be-

ing required to be distributed between the heirs, or rather, as the appellants contend, children, of J. K. Saunders and Perlia J. Wilcox, thereupon, subject to the charges named, the title in fee-simple vested in the children aforesaid. This argument derives its countenance from the construction urged that intermediate the death of Platt Saunders and the death of Perlia J. Wilcox and J. K. Saunders, the children of the parties last named must be vested with the title, for, it is insisted, the title cannot remain in abeyance. It is quite possible that the provisions of our statute may have some bearing upon this question of the title remaining in abeyance. Under chapter 23, Compiled Statutes, by virtue of section 280, the executor or administrator is held accountable for the income of real estate while it remains in his possession. Sections 289, 290, 291, and 292 of the same chapter prescribe the procedure and decree necessary in making distribution of real property. In *Doe v. Flanagan*, 1 Ga., 540 and 541, Judge Nesbitt, for that court, employed language which seems applicable to our statute in connection with the title to real property not remaining in abeyance after the death of its owner. The importance of the consideration whether or not it remains in abeyance, however, seems to us to have been rather overestimated by the appellants, for the cases which will hereinafter be cited seem to have been decided without reference to whether the title had vested or was in abeyance.

1. After the sale of the six-acre tract there still remained unpaid quite a balance due the creditors of the estate of Platt Saunders, whereupon application was made by the administrator to the district court of Douglas county for authority to sell the four-acre tract. The petition for this sale was in due form and the required notice thereof was duly published in the *Nebraska Watchman*, the paper designated as that in which publication was to be made. In the order confirming the sale it was recited that publication

had been made in the *Omaha Republican*. There was, however, competent independent evidence submitted on the trial of this case showing that in fact publication was made as required, both as to time and the newspaper designated, and we think this showing was properly considered. (*Britton v. Larson*, 23 Neb., 806.) Proceedings for the sale of real property by an administrator or executor are necessarily *in rem*. (*McClay v. Foxworthy*, 18 Neb., 295.) The jurisdiction having once vested no collateral attack can be tolerated in independent cases on account of mere irregularities alleged to have occurred in the proceedings leading up to or ending in the administrator's sale. No ground of objection is presented which does not fall within the designation just used, except as will be noticed in the further consideration in connection with another branch of this case.

2. As has already been noted, the six-acre tract was sold for the payment of debts against the estate of the said Platt Saunders which the personal property was insufficient to satisfy. The sale of this tract was made by the administrator *cum testamento annexo*, under the authority which the appellee claims existed under the following language of the will: "All the residue of the said ten acres shall be sold to the best advantage, and after paying all the lawful debts of the said Platt Saunders, the remaining proceeds shall be divided between the heirs of the said John K. Saunders and the said Perlia J. Wilcox. And furthermore, I hereby appoint and empower T. J. Torrey, of Valley precinct, Douglas county, Nebraska, to be my executor without bonds, and trust that this my last will shall be faithfully and impartially executed, and that the lands and moneys shall be given to their legal owners, and all moneys paid as fast as received by said executor." It is argued by the appellee that when a testator directs in his will that his estate shall be disposed of for certain purposes without declaring by whom the necessary sale shall be made, the

executor may make the sale if the proceeds thereof are distributable by him. The language in the closing part of the quotation just made indicates that distribution was to be made by the executor; indeed, the same result would have followed in the absence of the express provision just referred to. In resistance of this contention the appellants cite several authorities, a few of which seem in point, though most of them fall short of sustaining the proposition in support of which they are cited. The correct rule is believed to be to sustain the power of an executor to sell under the circumstances indicated. The unqualified and unhesitating manner in which the rule is stated and applied by courts and text writers of acknowledged weight, inspires confidence in their deductions independently of their number, which is not inconsiderable.

In *Peter v. Beverly*, 10 Pet., 532, the supreme court of the United States adopted the following language: "It is a well settled rule in chancery, in the construction of wills as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of land, courts of equity in dealing with the subject will consider it that species of property into which it is directed to be converted. This is the doctrine of this court in the case of *Craig v. Leslie*, 3 Wheat. [U. S.], 577\*; and is founded upon the principle that courts of equity, regarding the substance and not the mere form of contracts and other instruments, consider things directed or agreed to be done as having been actually performed.

\* \* \* In the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will,—to ascertain and carry into execution the intention of the testator. When the power is given to executors to be executed in their official capacity of executors, and there are no words in the will warrant-

ing the conclusion that the testator intended for safety, or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust charged upon the executors, in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. \* \* \* This is the doctrine of Chancellor Kent in the case of *Franklin v. Osgood*, 2 Johns. Ch. [N. Y.], 19, and cases there cited, and is in accordance with the numerous decisions in the English courts (3 Atk. [Eng.], 714; P. Wms. [Eng.], 102), and is adopted and sanctioned by the court of errors in New York, on appeal, in the case of *Franklin v. Osgood*. And Mr. Justice Platt in that case refers to a class of cases in the English courts where it is held that, although from the terms made use of in creating the power, detached from other parts of the will it might be considered a mere naked power to sell; yet if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the supreme court of Pennsylvania in the case of the *Lessee of Zebach v. Smith*, 3 Binn., 69. \* \* \* The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows as a matter of course that the testator intended his executors should make the sale, to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his treatise on Powers, page 167,

on the authority of a case cited from the Year-Books, lays it down as a general rule that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have by implication the power to sell."

Again, in the case of *Lippincott v. Lippincott*, 19 N. J. Eq., 121, the court made use of the following language: "The appointment of one as executor of a will that directs lands to be sold, does not of itself confer on him the power to sell. (*Patton v. Randall*, 1 Jac. & W., 189.) But if the executor is directed by the will or bound by law to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication."

In *Rankin v. Rankin*, 36 Ill., 293, occurs the following language: "No question can be, nor indeed is, made as to the intent of the testator that the land should be sold; but it is urged that the executors had no power to make the sale. It sometimes happens, says Williams on Executors, page 413, 'that a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale shall be made. In the absence of such a declaration, if the proceeds be distributable by the executor, he shall have the power by implication. Thus a power in a will to sell or mortgage without naming a donee will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies.' This principle is well settled and is not controverted by the counsel for the defendant in error, but it is contended that the proceeds of this sale were not distributable by the executor. The same learned author whom we have already quoted, on page 414, uses the following language: 'It is an established doctrine in courts of equity

that things shall be considered as actually done which ought to have been done, and it is with reference to this principle that land is under some circumstances regarded as money and money as land.' It is laid down by Sir Thomas Sewell, in *Fletcher v. Ashburner*, 1 Bro. C. C. [Eng.], 497, 'that nothing was better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted.' It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property. This principle is familiar law and has been recognized to the fullest extent by this court in *Baker v. Copenbarger*, 15 Ill., 103, and *January v. Smith*, 29 Ill., 116. This principle is decisive of this case. The land was directed to be sold and its proceeds divided among certain persons named in the will. It was then to be considered as a bequest of money. In the language above quoted, and the accuracy of which was approved in *Wheldale v. Partridge*, 5 Ves. [Eng.], 396, it is to be considered as that species of property into which it was directed to be converted. It is then a fund distributable by the executors to the devisees and as such passes through their hands by virtue of their office. This gave them the power to sell, according to the principle stated above in *Williams on Executors*."

The same propositions are sustained by the cases of *Gray v. Henderson*, 71 Pa. St., 368, and *Lindley v. O'Reilly*, 50 N. J. Law, 636. Indirectly the same propositions are countenanced in *Little v. Giles*, 25 Neb., 331. The latest decision upon this subject is that of *Hite v. Hite*, 1 Am. Law Register and Review [Ky.], n. s., No. 1, p. 49, the same result being reached as attained upon the cases already cited.

We conclude, therefore, that the will authorized the executor to sell the four-acre tract, charged as he was with the duty of distributing the proceeds of the sale by the will, which failed to designate by whom the necessary sale should be conducted.

3. The executor, however, having refused to qualify, the next question is as to whether or not the duty of selling could be performed by the administrator *cum testamento annexo*. The appellants insist that the power to sell rests upon the special confidence of the testator in the executor named, and that the power delegated to the executor cannot in turn be delegated by him. We do not understand that the powers of an administrator *cum testamento annexo* are powers delegated by the executor. They are such as are conferred by statute alone, the provisions of which, in this state, are found in chapter 23, Compiled Statutes, from which we quote the sections designated:

“Sec. 169. Every person who shall be appointed administrator with the will annexed shall, before entering upon the execution of his trust, give bond to the judge of probate in the same manner and with the same condition as is required of the executor, and shall proceed in all things to execute the trust in the same manner as an executor would be required to do.”

“Sec. 173. When an executor appointed in any will shall not be authorized, according to the provisions of this subdivision, to act as such, such as are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized, and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for any purpose.”

“Sec. 190. An administrator appointed in the place of

any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done, and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

In almost every case cited by the appellants for the purpose of showing that the administrator *cum testamento annexo* did not succeed to the rights of the executor named in the will, it will be found that there was some special confidence reposed by the testator in the executor named. This distinction is stated in 2 Williams, Executors [6th Am. ed.], p. 1011, cited by appellants. The same idea is shown to have had weight in *Naundorf v. Schuman*, 41 N. J. Eq., 14. In *Belcher v. Branch*, 11 R. I., 226, the will required the money to be loaned and the income applied to certain designated purposes, a duty more proper to be devolved upon a guardian than executor. In *M'Donald v. King*, 1 N. J. Law, 432, the bequest to be looked after was the rents, profits, and dividends of the income of real estate of the decedent. We are not to be understood as asserting that all cases cited by the appellants are qualified in the manner or measure stated, but that most of them are thus qualified. In other cases there are involved statutes so dissimilar to our own that the opinions are of little practical value as applied to our statute. Space forbids a detailed analysis of the cases referred to by appellants. The rule established upon the authorities is well stated in the cases from which copious extracts will now be made.

In the case of *Drummond, Adm'r, v. Jones*, 44 N. J. Eq., 53, we find the following language: "Where a power of sale is given to a particular person by words indicating personal confidence or special reliance on the judgment of

that particular person, as that the power shall not be exercised except the donee decides that its exercise is necessary or proper there, it being manifest from the words of the grant that the creator of the power meant to leave the question whether the power should be exercised or not wholly dependent on the judgment of the donee, no one in such a case can exercise it but the donee. (*Chambers v. Tulane*, 1 Stock. [N. J.], 146; *Naundorf v. Schuman*, 41 N. J. Eq., 14.) But where the power is annexed to the office of the executor, and it is created to enable an executor to perform the duties imposed on him by the will, there, although created by words giving the executor a right to exercise a discretion as to the time or the method of sale, the power will be considered impersonal and as a thing incident to the office which may be used by any person who may be charged with the duties of the office. In such cases, said Chief Justice Beasley, in *Weimar v. Fath*, 14 Vr. [N. J.], 1, 'the power is annexed to the office and not to the specified donee of the power.' The chief justice also said, in substance, in the same case, when, instead of there being an express designation of individuals, there is a designation, as recipients of the authority of a class of officers, there it will be understood that the power is intended to be lodged not in any particular individual, but in all persons who may at any time fill such office."

This subject is discussed in *Vernon v. Covell*, 54 Mich., 281, in the construction of a statute of which section 173, hereinbefore quoted, is an exact copy. In the case just cited, Judge Sherwood used the following language: "It is claimed by plaintiff's counsel that the provision of our statute, if the power did not exist at common law, gives full authority to the one executor in this case to make valid sale of the real estate of the deceased, and authorized him to make the contract in question (a contract to sell and convey real estate). I think this provision clearly authorizes the executor in this case to sell the real estate of the

deceased mentioned in the will, and to make the contract for the sale thereof, to secure the performance of which the deposit of the note in question and its indorsement were made. Not only is the sale authorized, but the designation of the person and his power to make it are derived solely from the will. The probate of the will and letters testamentary furnish no more than the evidence of the existence of these things, and not the authority for doing them. I think it may well be doubted whether the provisions of our statute, or that of 21 Hen. 8th, c. 4, so far as it relates to executors, is anything more than confirmatory of the common law upon this subject. (*Bonifaut v. Greenfield*, 1 Cro. [Eng.], 80; Co. Litt., 113a.) \* \* \* It would in my judgment be a perversion of the true intention and meaning of the statute, and do violence to what I believe to have been for a long time the accepted interpretation of the law by the profession generally in our state, to hold otherwise. It is possible, and I think quite probable, that were we to give the statute the construction claimed for it by counsel for the defendant, titles to large amounts of real estate, purchased in entire good faith, and now quietly enjoyed, might become unsettled, and all the evil consequences usually accompanying such action by the court would follow. I think the executor in this case had the power to make the sale of the homestead property of the Rumney estate, and the contract made therefor, and that the indorsement and transfer of the note in question were not without consideration, and must be held valid."

The provision of the will under consideration in *Davis v. Hoover*, 112 Ind., 423, was as follows: "It is also my will that the above described real estate be appraised and sold at private sale, \* \* \* and the interest, after deducting necessary expenses, given to my wife as her own property in accordance with item No. 1 of this will." The testator named no executor. Afterwards, one Free was appointed administrator with the will annexed, and sold at private

sale, and without an order of the court, real estate in question to one Miller. Hoover, the appellee, purchased this land from a remote grantee of Miller. In considering this case the court said: "It is insisted that the propriety of selling the real estate described in the will rested with, or rather in, the discretion of the common pleas court of Madison county, and not with Free, and hence, the sale to Miller without an order of that court was void; that, conceding that an order of court was not necessary, the sale ought to have been held void, because it was not affirmatively shown that the real estate was first appraised as required by the will. It was held in the case of *Land-ers v. Stone*, 45 Ind., 404, that the only practical difference between an executor and an administrator with the will annexed consists in the mode of their respective appointments, the first being named by the testator, and the latter by the court in which the will is proved. That is undoubtedly a correct statement of law as applicable to the duties ordinarily imposed upon an executor by the will. There may be an exception to this general rule where a personal and peculiar trust and confidence is reposed in the executor. (Williams, *Executors* [7th ed.], 461, and notes; *Farwell v. Jacobs*, 4 Mass., 634; 2 Rev. St., 1876, p. 530, par. 93; Rev. St., 1881, par. 2361.) The case before us falls within that general rule, and Free took all the power under the will which would have devolved upon an executor if one had been named."

In *Mott v. Ackerman*, 92 N. Y., 539, the court made use of the following language: "But we are of the opinion that the administrator with the will annexed has authority to make the necessary deed. The question has been left by the disagreement of the courts in some uncertainty, which should be dispelled, so far as it is possible to do so. The statute provides that administrators with the will annexed 'shall have the same rights and powers and be subjected to the same duties as if they had been

named executors in such will.' (2 R. S., 72, par. 22.) In construing this statute great differences of opinion have arisen. (*De Peyster v. Clendining*, 8 Paige Ch. [N. Y.], 296; *Conklin v. Egerton*, 21 Wend. [N. Y.], 430, 25 Wend. [N. Y.], 224; *Roome v. Philips*, 27 N. Y., 357; *Bain v. Matteson*, 54 N. Y., 663; *Bingham v. Jones*, 25 Hun [N. Y.], 6.) The debate has turned mainly upon the inquiry, what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee? Where the will gives a power to the donee in a capacity distinctly different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor, and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of executors *virtute officii*, and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which, by the operation of a power in trust, authority over the real estate is given to an executor as such, and the better to enable him to perform the requirements of the will. It will not do to say in the present state of the law that whenever a trust or trust power is conferred upon executors relating to real estate, some personal confidence distinct from that reposed in executors is implied. An executor is always a trustee of the personal estate for those interested under the will. We have recently so decided where the trust character could only be derived from the office and its relations to rights claimed through it. (*Wager v. Wager*, 89 N. Y., 161.) And we have held also that where a will devised and bequeathed to the executor the residue of real and personal estate, in trust, to sell and convert the same, to divide the balance into shares, to invest it in bond and mortgage and to pay

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over the income for a time, and finally the principal, the proceeds of the land sold became legal assets in the hands of the executor for which he was liable officially, and for which his sureties were responsible, and that an objection that he held the proceeds as trustee and not as executor, and could only be made accountable in equity, was not well taken. (*Hood v. Hood*, 85 N. Y., 571.) We have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment, and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute passes to and may be exercised by the administrator with the will annexed. That is the case before us, and the deed of the administrator with the will annexed will be as effectual as would have been that of the executor if he had survived."

The quotations which we have made on this branch of the case clearly express our views upon the subject considered, and fully embrace all the questions remaining for consideration. It follows from these views that the judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the decision.

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39	158
41	901
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GEORGE L. HURLBURT ET AL. V. CLINTON R. PALMER,  
ET AL.

FILED FEBRUARY 6, 1894. No. 4832.

- 1. Banks and Banking: DRAFTS: FACTORS AND BROKERS.** A shipper of hogs arranged with a firm of commission brokers that all his hogs as purchased should be consigned to said brokers for sale; the said brokers on their part agreeing to pay such drafts as by the shipper should be made on them through a local bank, the proceeds of such drafts to be used by the shipper in making payments for hogs purchased, and to be consigned as the property of the shipper. *Held*, That the mere fact the said bank, without fraud or collusion, though with knowledge that the shipper was procuring funds with which to purchase hogs under this arrangement, induced the shipper to pay to itself a debt justly due it from him, he using for that purpose the proceeds of drafts drawn through the bank as above contemplated, did not render the bank liable to pay to the aforesaid firm of brokers the amount or value of property so received by it, whether in money, or in hogs purchased by the shipper.
- 2. Jurisdiction of Courts: PLEADING: SUMMONS.** The plaintiffs in error, who were defendants in the trial court, answered, first, by a general denial qualified by certain admissions; second, that by an abuse of the criminal process of the state, a co-defendant had been taken from the jail of Seward county to Douglas county, wherein he was served with summons, after which he was returned at once to the Seward county jail; that all the defendants were, at the commencement of the action, residents of Seward county, and that the aforesaid abuse of criminal process was resorted to by and on behalf of plaintiff solely to obtain in Douglas county jurisdiction of the persons of the answering defendants, notwithstanding their residence in Seward county. *Held*, (1) That the facts pleaded as to the jurisdiction of the district court of Douglas county, stated a substantive defense properly presented by answer; (2) that the second defense pleaded was not waived by reason of being included in the answer wherein had been stated the first defense; (3) that such objections to the jurisdiction as do not arise upon the summons, the indorsement or service of the summons, or upon the face of the petition, must be raised by answer as a matter of defense.

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3. **Objection to Jurisdiction: WAIVER BY APPEAL.** When the district court has not otherwise obtained jurisdiction of the person of a defendant, he does not submit himself to its jurisdiction by appealing or prosecuting error to this court; and the case of *Shawang v. Lore*, 15 Neb., 142, holding the contrary doctrine, is overruled, as in contravention of the provisions of section 24, article 1, of the constitution of this state.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

The facts are stated in the opinion.

*R. S. Norval* and *E. M. Bartlett*, for plaintiffs in error:

Where a person is taken or inveigled by force, fraud, or other means into the jurisdiction of the court for the purpose of getting service upon him, the service is bad and the court will acquire no jurisdiction. (*In re Robinson*, 29 Neb., 135; *Wyckoff v. Packard*, 20 Abb. N. Cas. [N. Y.], 420; *Compton v. Wilder*, 40 O. St., 130; *Van Horn v. Great Western Mfg. Co.*, 37 Kan., 523.)

An objection to the jurisdiction of the court over a defendant will not be waived, although such defendant answer to the jurisdiction as well as to the merits, when the practice permits a defense to the merits to be united with the plea to the jurisdiction. (*Cobbey v. Wright*, 29 Neb., 274; *Christian v. Williams*, 35 Mo. App., 297; *Allen v. Miller*, 11 O. St., 374.)

Unless the court acquires jurisdiction by reason of the subject-matter being situate within the county where the action is brought, the action must be commenced in the county in which the defendants or some one of them reside, or may be served with a summons. (*Cobbey v. Wright*, 29 Neb., 274; *Dunn v. Haines*, 17 Neb., 560.)

The plaintiffs below failing to take any judgment against the defendant Virgin, who only was served in Douglas county, and he having been taken into that county by force, fraud, and connivance for the purpose of serving the

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summons on him there, the court could have no jurisdiction over the plaintiffs in error. (*Cobbey v. Wright*, 23 Neb., 250; *Dunn v. Hazlett*, 4 O. St., 436; *Allen v. Miller*, 11 O. St., 374.)

*Charles Offutt and Colman & Colman, contra:*

A defendant may appear specially to object to the jurisdiction of the court, either over his own person or the subject-matter of the suit, without waiving his right to be heard on the question on appeal or error. But if by motion, or any other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. Such an application concedes a cause over which the court has jurisdiction to act. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 15; *Cropsey v. Wiggenghorn*, 3 Neb., 116; *Crowell v. Galloway*, 3 Neb., 220; *Aullman v. Steinan*, 8 Neb., 111; *Kane v. Union P. R. Co.*, 5 Neb., 106; *Hilton v. Bachman*, 24 Neb., 505; *Shawang v. Love*, 15 Neb., 142.)

Every dollar which Virgin obtained from Palmer, Richman & Co., which was not invested in stock and which was by him diverted to his personal use, was fraudulently obtained and fraudulently used, so far at least as Virgin was concerned. It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him, and by all persons claiming under him, with notice, in trust for the original owner. So long as the property can be identified in its original, or in a substituted form, it belongs to the original owner, if he elects to claim it; and if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved, no matter how many transmutations of form the property has passed through. So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. The

product or substitute has the nature of the original imparted to it. The depositing of trust money in a bank, although it creates the relation of debtor and creditor between the bank and the depositor, does not change its character, nor relieve the deposit from the trust. It is not the identity of the form, but the substantial identity of the fund itself, which is the important thing. (*Taylor v. Plumer*, 3 Maule & S. [Eng.], 562; *Pennell v. Deffell*, 4 De Gex, M. & G. [Eng.], 372; *Frith v. Cartland*, 2 Hem. & Mill. [Eng.], 417; *Knatchbull v. Hallett*, 13 Ch. Div. [Eng.], 696; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. [Va.], 544; *Van Alen v. American Nat. Bank*, 52 N. Y., 1; *People v. City Bank of Rochester*, 96 N. Y., 32; *Cragie v. Hadley*, 99 N. Y., 131; *Whitley v. Foy*, 6 Jones Eq. [N. Car.], 34; *Farmers & Mechanics Nat. Bank v. King*, 57 Pa. St., 202; *Peak v. Ellicott*, 30 Kan., 156; *National Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54; *McLeod v. Evans*, 28 N. W. Rep. [Wis.], 173; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 30 N. W. Rep. [Minn.], 440; *Amer v. Hightower*, 70 Cal., 440; *Sleeper v. Davis*, 64 N. H., 59.)

The interposition of equity is not necessary to a protection of all rights where a trust fund has been perverted. The *cestui que trust* can follow it at law so far as it can be traced. (*United States v. State Bank*, 96 U. S., 35; *May v. Le Claire*, 11 Wall. [U. S.], 217; *Taylor v. Plumer*, 3 Maule & S. [Eng.], 562; Newmark, Deposits, sec. 24; *Union Stock Yards Co. v. Gillespie*, 137 U. S., 411.)

RYAN, C.

During all the time within which the transactions referred to in this case took place, the firm of Palmer, Richman & Co. was engaged in the live stock commission business in South Omaha. At the same time, George L. Hurlburt, George Liggett, and Clifford G. Hurlburt were doing business at Utica, Nebraska, under the name and style of the Merchants Bank. Alexander C. Virgin was

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also a resident of the town last named. The first named firm sued the aforesaid banking partners and Alexander C. Virgin, in the district court of Douglas county, Nebraska, for the sum of \$2,000, with interest from the 1st day of December, 1888, and costs. Upon a verdict found in favor of Palmer, Richman & Co., judgment was rendered for its amount, being for the sum of \$2,023.43. The Hurlburts and Liggett bring the case into this court for review upon petition in error. The petition in the district court, after stating the facts above set forth as to the membership of the above firm, their occupation and location, stated the plaintiffs' cause of action in the following language:

"3. That about the middle of the month of October, 1888, these plaintiffs arranged with the defendant Alexander C. Virgin that these plaintiffs would furnish the said Virgin money with which to pay for cattle and hogs which the said Virgin might thereafter buy, on condition that the said Virgin should consign the same to these plaintiffs at South Omaha for sale on the market, and that these plaintiffs would make sale of the stock so consigned to them and apply the proceeds of such sales, less the commission of these plaintiffs, to the payment of the money and interest thereon so as aforesaid advanced to the said Virgin. And the said Virgin, in consideration thereof, did agree to proceed at once to make purchase of the said stock, and that after he had purchased the same he would draw upon these plaintiffs at sight for the amount of the cost thereof, through the defendant the Merchants Bank aforesaid. These plaintiffs then saying, and it being distinctly understood between them and the said Virgin, that the said Virgin was not to make any drafts upon these plaintiffs for such advances until after he had purchased the stock for shipment to the plaintiffs as aforesaid, and that the said drafts should in no case exceed the amount which the said Virgin had actually contracted to pay for the stock actually purchased by him and arranged for their shipment to these plaintiffs.

"4. Plaintiffs say that the defendant Virgin immediately thereafter acquainted the defendant the Merchants Bank with the nature of the said agreement with these plaintiffs, and that before any payments were made by these plaintiffs on account of said agreement to the defendant Virgin, the defendant the Merchants Bank fully knew and understood the exact nature and extent of the agreement with regard to the advances so to be made by these plaintiffs, and the exact nature and condition of said agreement.

"5. That at that time, that is to say, during the month of October, 1888, the said Virgin was indebted to his co-defendant, the Merchants Bank of Utica, in a large sum of money, the exact amount of which is unknown to these plaintiffs, but the same was more than \$2,000, and the said Virgin was then, as these plaintiffs are now informed, insolvent and largely involved, all of which was well known to his co-defendant, the Merchants Bank of Utica; that said Merchants Bank of Utica unlawfully and fraudulently designing to cheat and defraud these plaintiffs out of their money, and fraudulently designing and intending to secure the indebtedness which the said Virgin then owed to the Merchants Bank, by obtaining payment thereof from these plaintiffs, did unlawfully and fraudulently agree and arrange with the said Virgin that said Virgin should draw on these plaintiffs for large sums of money, to-wit, on November 16, 1888, for \$1,800, and on November 20, 1888, for \$1,000, and that the same should be applied on the indebtedness said Virgin then owed the Merchants Bank as aforesaid, in fraud of the rights of these plaintiffs.

"6. And the plaintiffs say that upon or about the dates aforesaid the defendant Virgin, in pursuance of the arrangements with the defendant the Merchants Bank, as hereinbefore stated, did draw upon these plaintiffs for the said sum of \$1,800 and \$1,000 through the defendant the Merchants Bank, and the said drafts were, as soon as presented to these plaintiffs, viz., on or about November 19

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and 24, respectively, paid by these plaintiffs in full, and the proceeds thereof remitted to and received by the defendant the Merchants Bank; that at the time the said drafts were drawn, as aforesaid, the defendant Virgin had not purchased the stock to be paid for with the aforesaid money, except about \$800 thereof, and the said Merchants Bank well knew that fact, and well knew the defendant Virgin had no right or authority to draw upon these plaintiffs for any portion of said money, except so much thereof as was necessary to pay for such stock as said Virgin may have purchased for shipment to these plaintiffs, and received the same in full of these drafts and converted the same to its own use by applying the same wrongfully and fraudulently to the indebtedness which the said Virgin owed it as aforesaid; and that the \$800 worth of stock was purchased as aforesaid by the said Virgin, the amount in full thereof was received by the said defendant the Merchants Bank in part discharge of said Virgin's indebtedness to it, well knowing at the time that the said stock and the said money with which the same was paid were the property of these plaintiffs. And plaintiffs say that they have demanded that the defendant should repay the same to these plaintiffs, but they have failed to pay the same, or any part thereof, and that by reason of their said failure these plaintiffs have been damaged by the defendant in the sum of \$2,000, no part of which has been paid."

These averments of the petition are set out in full that there may be no misapprehension as to the theory upon which plaintiffs based their right of recovery. The evidence discloses the fact that at the time the two drafts of date November 19 and November 24, respectively, were drawn, the defendant Virgin was indebted to the bank in a sum exceeding the amount of either of said drafts. It is equally clear from the testimony that the title to the property purchased by Virgin for shipment to Palmer, Richman & Co. was not in Palmer, Richman & Co., nor

did the arrangement between these parties and Virgin contemplate that the title should be held by any other than Virgin himself until the several shipments were received at South Omaha. There is no testimony whatever to sustain the averment that there was a conspiracy, or anything in the nature of a conspiracy, between the partners composing the Merchants Bank and Virgin, with respect to a contemplated misappropriation of the proceeds of the drafts drawn by Virgin on Palmer, Richman & Co. in favor of the Merchants Bank.

The plaintiffs' right of action, if a right of action exists in their favor, must be predicated solely upon the facts set out in paragraphs numbered 3 and 4, supplemented with the fact that the proceeds of the drafts so drawn were applied by the Merchants' Bank in payment of an indebtedness to that bank owing by Virgin, the drawer of the drafts, to it, and the taking of a mortgage to the bank upon property, for the payment of which the proceeds of the drafts were designed by the drawer and the drawee to be used. The testimony as to the knowledge of the partners composing the firm known as the Merchants Bank, of the arrangements between Virgin and Palmer, Richman & Co., is not as broad as the allegations of the petition. The only witness who testified as to facts which would charge the members of the firm known as the Merchants Bank with notice was Alexander C. Virgin himself. He says in his evidence that "I told them that I had made arrangements down with Mr. Richman, or Palmer & Co., that I would draw so much for the shipment of hogs that would have to follow, or stock—I don't think I said hogs." This conversation he said was close to the first day on which he drew a draft. The witness further testified that about the last of October, 1888, he had an overdraft in the Merchants Bank, and that Mr. Liggett wanted him to turn over some hogs he had in his possession, and that witness did not think it was right to do it, and that Liggett in-

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sisting upon his doing so, witness told him he would not do it; that Mr. Liggett came to witness and said that witness must straighten up with the bank or that he would dishonor witness's checks, and that witness could not handle any more hogs; that witness told him he would do anything that was honorable and right to do; that Liggett said that if witness would give him a mortgage on what stuff witness had there, some cattle and what hogs were in the yard, and some personal property there, and a draft on Palmer, Richman & Co. for the \$1,000 or \$1,200, something like that, that there would be nothing wrong about it, and that he, Liggett, would see that witness was protected; that witness asked Liggett then if he would not give witness time so that witness could work it out, and that Liggett said he would not; that he would close right up on witness if witness did not do it, and that witness turned right around and gave him a mortgage on the stuff. This witness further stated that he told Liggett that he had promised to draw these drafts and make shipments afterwards; that it was an accommodation to the witness so to do; that such shipments were to be made to Palmer, Richman & Co., and that witness did not think it would be right under the circumstances to do as Liggett required, but that Liggett said it would be perfectly right, and that thereby witness did not lay himself liable, either criminally or in any other mode, and that he, Liggett, would protect witness in every shape, way, and form if witness would do this and turn them over to him. This witness further testified that all of the hogs mortgaged had been paid for with the money witness got from Palmer, Richman & Co.

After the giving of the mortgage and the turning over to the Merchants Bank of the proceeds of the last draft, there is evidence that there was a conversation in the Merchants Bank between the defendants, that is to say, the Hurlburts and Liggett of one part, and Virgin of the other part, from which it was possible for the jury to infer

that the Merchants Bank had promised to hold Virgin harmless as to the indebtedness due from Virgin to the bank, as well as a certain other indebtedness due from Virgin to a school district, if Virgin would comply with the request of Liggett as to giving a mortgage and turning over the \$1,000. In our view of the matter, however, this is not specially material. The question then presented upon the petition and the evidence given in support of it is simply whether the Merchants Bank was liable to Palmer, Richman & Co. for the value of the stock mortgaged to it and for the proceeds of the draft paid by Palmer, Richman & Co. upon the arrangement that the proceeds of the drafts should be used by Virgin in the purchase of stock and shipment thereof to the live stock commission firm aforesaid. It is not claimed that there was any privity between the Merchants Bank and Palmer, Richman & Co. The only theory upon which a recovery can be had by the latter named firm against the former is that the sale of the stock mortgaged to the Merchants Bank, and the proceeds of the drafts drawn through that bank, were applied upon an indebtedness conceded to be due from Virgin to the said bank. The conversation between Virgin and Liggett was, according to Virgin's account of it, only such as would advise Liggett of the intention on the part of Virgin to use the money advanced by Palmer, Richman & Co. in making payment for hogs which Virgin had already bought in his own name. As the title was in Virgin, Palmer, Richman & Co. could assert no claim as against the hogs themselves, unless they were entitled to a lien upon them for advances made to be used in paying for them. When the last draft for \$1,000 was paid by Palmer, Richman & Co., it was to supply Virgin with money for the purpose above indicated.

Counsel for defendants in error insist that the sole question was this: "Did the Merchants Bank receive the money advanced by Palmer, Richman & Co. *bona fide*

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and without notice of the purpose for which it had been advanced to Virgin?" The element of *bona fides* does not enter into the proposition, except in so far as inducing Virgin to pay to the bank money which had been advanced to him for another specific purpose may have been *mala fide*. The money advanced to Virgin was essentially a loan, and the fact that it was designed to be applied to a particular purpose made it none the less so. For illustration, let us suppose the bank had loaned Virgin money with which to buy hogs for himself, and that instead of purchasing hogs he had used the money loaned him to pay his grocery bill. Could the grocer be held liable to the bank for the amount of such payment received by him, even though he knew when he received payment that the bank loaned the money that hogs might be purchased with it? Or, let us suppose that Virgin used the money which he borrowed of the bank, in the hypothetical case just stated, in buying hogs which he afterwards mortgaged to secure his grocer, and the grocer forecloses his said mortgage. On what theory could the bank recover from the grocer the value of the hogs? Upon the evidence in this case a recovery would be a precedent for holding liable the grocer in either of the cases supposed. In respect of this matter, however, the contention of the defendants in error is made in the following language: "Every dollar which Virgin obtained from Palmer, Richman & Co., which was not invested in stock, and which was diverted by him to his personal use, was fraudulently obtained and fraudulently used, so far at least as Virgin was concerned. It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him, and all persons claiming under him with notice, in trust for the original owner. So long as the property can be identified in its original form, or in a substituted form, it belongs to the original owner, if he elects to claim it; and if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner,

at his option, at once attaches to the avails so long as their identity is preserved, no matter how many transmutations of form the property has passed through. So long as the trust property can be followed and traced into other property into which it had been converted, that remains subject to the trust. The product or substitute has the quality of the original imparted to it," etc. With this statement of principles we have no occasion to quarrel. The difficulty is that there is no trust relation shown other than such as exists ordinarily between a debtor and creditor. The loan was to enable Virgin to pay for hogs purchased by himself, for himself, and to be shipped as his property to Palmer, Richman & Co., by whom they were to be placed on the market, and in the proceeds of the sales alone were they interested, and that only to the extent of obtaining reimbursement for the money previously loaned Virgin. Instructions were given, based on the theory above stated, as the contention of the defendants in error, and as such instructions were propounded upon an erroneous conception of the relations and resulting obligations as between the parties in this litigation, they cannot be sustained. Neither the facts in support of which there was evidence, nor the law applicable to such facts, justified the judgment of the district court.

The petition in this case was filed on May 10, 1889. On the same day a summons was issued directed to the sheriff of Douglas county, commanding him to notify the defendant Virgin (impleaded with George L. Hurlburt, George Liggett, and Clifford G. Hurlburt) that he had been sued by Clinton R. Palmer and others, and requiring him to answer on or before the 10th day of June following. On the same date, to-wit, May 10, 1889, there was issued an alias summons directed to the sheriff of Seward county, commanding him to notify the defendants Hurlburt and Liggett, partners under the firm name and style of the Merchants Bank, that they were required to answer on or

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before the 17th day of June immediately following. The summons directed to the sheriff of Douglas county was served on Alexander C. Virgin May 15, 1889, in that county. On the 17th day of May aforesaid, the alias summons was served on the Hurlburts and Liggett in Seward county, Nebraska. On August 21, 1889, a third summons was issued to the sheriff of Douglas county commanding him to notify Alexander C. Virgin, impleaded as above described, that he had been sued by Clinton R. Palmer and others, and requiring him to answer on or before the 23d of September, 1889. This third summons was served on Alexander C. Virgin August 21, the same day upon which the sheriff made return that he received the summons. Still further, on the same day, August 21, 1889, Alexander C. Virgin, in writing, entered his voluntary appearance in the cause and submitted himself to the jurisdiction of the court, as he recited in the paper by which he entered such voluntary appearance. No answer or other pleading was filed by or on behalf of Virgin after the entry of his voluntary appearance above recited. On the 15th day of June, 1889, George L. and Clifford G. Hurlburt and George Liggett filed their answer to the petition of plaintiff, in which they first admitted they were partners doing business as the Merchants Bank, and denied all other allegations therein contained. This admission and denial constitute the first defense, which was separate and distinct from that which followed. The second defense was pleaded as follows:

“2. These defendants allege that at the commencement of this action neither was a resident of, nor within, the county of Douglas, nor was service of summons had on either of them therein; that their co-defendant, Alexander C. Virgin, as well as these defendants, were at the commencement of this action and prior thereto, and are now, *bona fide* residents of Seward county, Nebraska; that prior and subsequent to the commencement of this action the defend-

ant Virgin was confined in the jail of Seward county, Nebraska, in default of bail, and the said Virgin was taken by the deputy sheriff of Seward county, Nebraska, without any authority of law, by and at the request of plaintiffs' attorneys, out of the jail of Seward county, Nebraska, and conveyed to the city of Omaha, Nebraska, by said deputy sheriff, and when he arrived in said city, and while in the custody of said deputy sheriff, he was served with a summons in this action, and said service is the only service had upon him; that said Virgin was taken to the city of Omaha, Nebraska, by the fraud and collusion of plaintiffs' attorneys, for the purpose of serving him with a summons, and as soon as said service of summons was obtained upon him as aforesaid, he was conveyed by said deputy sheriff back to and confined and deposited in said jail of Seward county, Nebraska, aforesaid; and these answering defendants aver that the only service had upon them, or either of them, was in Seward county, Nebraska, and that the service of summons upon said Virgin was a fraud upon him, or in collusion with him was a fraud upon these answering defendants and upon the jurisdiction of this court, and was obtained as aforesaid for the purpose of making these answering defendants contest their cause at Omaha, Nebraska, instead of where they and their co-defendant reside."

Upon the trial of the cause the defendants Hurlburt and Liggett offered to prove by Mr. Murphy that at the time the action was commenced the said Murphy was deputy sheriff of said Seward county, Nebraska, and that at the request of counsel for plaintiffs he brought the defendant Alexander C. Virgin into Douglas county, and that within an hour after he arrived in the city of Omaha, plaintiffs caused the summons which was served upon him to be served in the county of Douglas, and that said Virgin was at the time held upon the charge of embezzlement, and after service as aforesaid was taken immediately back to Seward county, where he remained in confinement to exceed

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the period of thirty days; that he was brought into Douglas county, not upon his own request, but by the direction of plaintiff's attorney, Mr. Colman, who paid his railroad fare and the hotel bills, in order to get service upon George L. and Clifford G. Hurlburt, and George Liggett, and to compel them to go to Douglas county to defend this action, and the offer was tendered for the purpose of showing that jurisdiction was obtained upon the defendants Hurlburt and Liggett in fraud of the process of the court in Douglas county. This offer was objected to upon the ground that it was immaterial, irrelevant, and incompetent. The objection was sustained by the court on the ground that defendants having voluntarily appeared and answered in the case, it was too late at the time of the offer to raise the question of jurisdiction. To this ruling due exception was taken.

These facts present for our determination the question whether or not by answering as one defense by way of a general denial (modified perhaps by an admission), the defendant of necessity waived his right to plead as a separate defense such facts as would show that jurisdiction of the person of the defendant had been obtained, if at all, by fraud and abuse of the process of the court—the facts above offered to be proved leaving no room for a milder statement as to the propositions in support of which proof was tendered. It is greatly to be regretted that the adjudications of this court upon the proposition stated furnish apparent authority for the contention of each party.

Counsel for defendants in error cite *Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14, a case in which it was held that the defendant might appear specially to object to the jurisdiction of the court either over the subject-matter of the action or of his person, but that if by motion or other form of application to the court he sought to bring its powers into action, except on the question of jurisdiction, he should be deemed to have appeared generally.

In *Cropsey v. Wiggenghorn*, 3 Neb., 108, it was held that

after the defendant had filed a motion to strike from the files an improperly verified petition, it was too late to raise the question as to the court having properly acquired jurisdiction of the defendant upon a summons insufficiently indorsed.

The facts in the case of *Crowell v. Galloway*, 3 Neb., 215, were that the return day in a summons was fixed for the first Monday instead of the third Monday, as required by section 66 of the Code of Civil Procedure. After judgment by default the defendant filed a motion for its vacation, because there had been indorsed on the summons no amount for which, in case of default, a judgment would be taken, and "because the summons had not been made and issued in conformity to law." No ruling was had upon the motion in the trial court, and this court held that the above assignment made, of irregularity as to the making and issuing of the summons, was too indefinite to be considered. LAKE, C. J., commenting upon the remainder of the motion, said: "It is a general, and we think a wholesome rule of practice, that if the defendant intend to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this and appear for any other purpose at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process and to have given the court complete jurisdiction over him for all the purposes of the action." As applied to matters appearing upon the face of the record itself, in the case then under consideration, this language is not open to criticism.

In *Aultman v. Steinan*, 8 Neb., 109, it was held that service of summons might not be made by leaving a copy at the defendant's usual place of business, yet that if the defendant wished to avail himself of the defect named, he must confine his motion to that alone.

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In *Kane v. Union P. R. Co.*, 5 Neb., 106, it was held, merely where a public officer was sued in a county other than that of his residence for a wrongful act by him done under color of his office, that if he voluntarily appeared and pleaded to the merits of the case, he waived the objection to the jurisdiction of the court. This hardly countenances the proposition that where such a defendant appeared and objected to the jurisdiction he thereby waived his said objections.

In *Hilton v. Bachman*, 24 Neb., 490, the holding was that no collateral attack upon the judgment could be permitted whereby it was sought to show that no proper service of summons had been made when the defendant voluntarily appeared and made a contest upon other matters pending in the suit wherein he had been irregularly summoned.

In *Bucklin v. Strickler*, 32 Neb., 606, it was held that a motion to quash containing a prayer for dismissal was a general appearance of the defendant.

A careful review and consideration of all the cases decided by this court upon the subject under consideration fully satisfies us that the point presented has never yet been settled as contended by the defendants in error, and as perhaps assumed by the learned district judge. Each case claimed to sustain the contention of the defendants in error was where there was a merely defective service, or where the summons was either defective in itself, or by reason of its indorsement. These were matters which the court could determine by an inspection of the summons or by an examination of the return, or of the indorsement criticised. It is very clear that as to these the defendant can raise objections without the necessity of showing facts independently of the record. Sound reasons therefore exist for requiring the defendant to confine himself to pointing out these objections to jurisdiction distinctly from any other matters. The objections urged in this case, if shown to be

founded upon facts, should just as completely deprive the court of jurisdiction as any of the enumerated matters observable of record. Such objections, however meritorious, can only be considered when pleaded and proved as facts. How this is to be done is a question which we must now determine.

In *Cobbey v. Wright*, 29 Neb., 274, MAXWELL, J., delivering the opinion of this court, said: "Unless the court acquires jurisdiction by reason of the subject-matter being situated within the county where the action is brought, the action must be commenced in the county in which the defendant resides or may be served with a summons. (*Dunn v. Haines*, 17 Neb., 560; *Pearson v. Kansas Mfg. Co.*, 14 Neb., 211; *Cobbey v. Wright*, 23 Neb., 250; *Allen v. Miller*, 11 O. St., 374.) Unless there is a general appearance in the case, the court can acquire jurisdiction only in the mode provided by law; and it is not the policy of the law to permit a nominal defendant having no real interest in the result of the action to be joined with the real defendant in order that an action may be brought against such actual defendant in a county other than that in which he resides or may be summoned."

In the case of *Dunn v. Haines*, cited with approval in the quotation just made, MAXWELL, J., for the court, said: "Where it is claimed that the county court has erred by assuming jurisdiction over the person of the defendant in an action pending in that court, the proper mode of reviewing the question of jurisdiction, or the want of it, is by petition in error to the district court. In a court of original jurisdiction a defendant may join all his defenses in one answer; that is, he may plead want of jurisdiction and to the merits, because if any one of his defenses is good and sufficient it will defeat a recovery, and the Code authorizes him to plead any defense, counter-claim, or set-off he may have. As he relies upon the want of jurisdiction over his person that question is in issue, and if

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the ruling is against him he may have it reviewed on error."

The right of the defendants, situated as were the plaintiffs in error, to plead want of jurisdiction by way of answer as a defense is recognized in *Allen v. Miller*, 11 O. St., 374, and in *Drea v. Carrington*, 32 O. St., 595. In the latter of the two cases just cited it was held that the questions pertaining to jurisdiction, of necessity raised by answer, could only be tried by the jury unless parties consent that the court might determine them. By the same court proceedings to obtain jurisdiction of the persons of the defendants much like that charged in this case were severely reprehended in *Compton v. Wilder*, 40 O. St., 130.

In reference to a somewhat analogous question to that under consideration, a plea of non-joinder of parties plaintiffs, Sherwood, C. J., thus stated the view of the supreme court of Missouri, in *Little v. Harrington*, 71 Mo., 391: "Under our Code, as the plaintiff sued as the sole owner of the goods, and as the objection could not be taken by demurrer, it only remained for the defendants to interpose such objections by answer; this they did, and in this it is quite clear from the authorities cited that they should have been successful and the plaintiff should have been compelled to amend before proceeding further with his suit; and it was competent for the defendants, in connection with other matters in the same answer, to plead the non-joinder of Winkle as co-plaintiff. The statute expressly says that 'the only pleading on the part of the defendant is either a demurrer or an answer.' (2 Wag. Mo. Stat., p. 1014, sec. 4.) And with the same degree of explicitness it is provided that the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have heretofore been denominated 'legal or equitable,' or both. (Ib., 1016, sec. 13.) It is evident from these statutory provisions that only one answer is contemplated, and this to contain whatever defense or defenses the defend-

ant may have, thus dispensing with the common law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits. On this point Judge Bliss in his recent work very justly and pertinently observes 'matter in abatement is as much a defense to the pending action as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues in regard to the former, would interpolate what is not in the statute; would be inconsistent with its plain and simple requirements.' (Bliss, Code Plead., sec. 345.) A different view of this subject was at first taken in New York from the Code of which our own is derived, but subsequent adjudications have overruled former ones and announced and enforced statutory rules. 'The same course of judicial decision now prevails in Indiana, and prior decisions at variance with it have been held incorrect. (Ibid., and cases cited.)'

The same court in *Byler v. Jones*, 79 Mo., 263, recognized the analogy above referred to, and for our purpose, sufficiently state the essential fact of the case it had under consideration in the following language: "Our practice act provides that suits by summons shall be brought 'when the defendant is a resident of the state, either in the county within which the defendant resides or in the county within which the plaintiff resides and the defendant may be found.' (R. S., sec. 3481.) The motion admitted the facts of the plea, and according to the truth of the plea, the defendant was a resident of Morgan county and while there could not be found in Lynn county. The plaintiff, with the view of rendering it possible for the sheriff of Lynn county to find him there, made use of the criminal process of the state which extends to any county for the purpose of bodily seizure and transportation. After such seizure or arrest and transportation to Lynn county, the defendant is served with process in this proceeding for damages. This method of finding a citizen in the county where the plaintiff

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iff resides cannot receive the approbation of this court. It was an abuse of the criminal process of the state to employ it for any such a purpose, and the courts of Lynn county could acquire no rightful jurisdiction over the person of the defendant in any civil proceeding by means of such a contrivance and wrong. No rightful jurisdiction of a party can be acquired by fraud or misrepresentation, and if the person so proceeded against brings it properly to the attention of the court assuming jurisdiction over him, as the defendant did in this case, the suit must be dismissed after proof or admission of the facts. (*Capital City Bank v. Knox*, 47 Mo., 334; *Vastine v. Bast*, 41 Mo., 493; *Graham v. Ringo*, 67 Mo., 324.) A demurrer would be the better method of contesting the validity of the answer than a motion to strike it out. I may remark in this connection, that under the recent decisions of this court the defendant could have included in his answer a defense to the merits of the case without foregoing the benefits of his plea to the jurisdiction. (*Little v. Harrington*, 71 Mo., 390.)” The same principle was announced and enforced, under circumstances much like those of the case last cited, in *Christian v. Williams*, 35 Mo. App., 297.

The misapprehension of the scope of former decisions of this court as justifying an inference of waiver as to the question of jurisdiction, by pleading the facts defeating it in connection with other matters of defense by way of answer, required the review by this court of its former opinions on that subject, and having found that this court had not gone to the extreme assumed, it was deemed but proper to notice the holdings of other courts upon the same subject. Our conclusion is, that under section 99 of the Code of Civil Procedure it is proper to plead as a distinct defense such facts as do not appear in the record, whereby it is made known that the court has no jurisdiction either of the person or the subject-matter of the action. As an original question it would seem that there should

have been no doubt as to this proposition, for it is provided in section 94 of the Code of Civil Procedure, among other provisions, that "the defendant may demur to the petition only when it appears on its face either, first, that the court has no jurisdiction of the person of the defendant or the subject of the action," etc. In the same Code it is provided as follows by section 96: "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same," etc. By this section it is expressly provided that the failure to make objection by answer, where the defect does not appear upon the face of the petition, shall be deemed a waiver of such defect; that is to say, the failure to raise by answer the question of jurisdiction, arising as it did in this case, must be deemed a waiver of all objections on that score. It is a harsh and unnatural construction, and one in direct contravention of the provisions of this section, to hold that by taking objections to jurisdiction in the manner provided thereby, the defendant waives the very objections he shall be deemed to have waived unless he proceeds in that very manner. In view of all the considerations to which attention has been challenged, we conclude that the district court erred in sustaining the objections made to the evidence offered for the purpose of showing that the court had no jurisdiction of the persons of the plaintiffs in error.

In the case of *Shawang v. Love*, 15 Neb., 142, COBB, J., said that his understanding of the law as well settled was, that by taking an appeal or suing out a writ of error the defendant waived all errors of want of jurisdiction of the person; in other words, that by appealing or suing out a writ of error the party submitted himself to the jurisdiction of the district court. If this proposition is a correct statement of the law, it necessarily results that where the defendant must specially plead the want of jurisdiction by

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answer he can be heard in respect thereto only in the court where he first makes the objection, for, if, as in the case at bar, he, in this court, attempts to have reviewed the errors which he alleges attended the determination of the question of jurisdiction in the district court, he will not be heard, simply and solely because he has brought the question to this court. In this we cannot concur. The statute gives the defendant the right to raise this question by answer, nay, more, in a certain class of cases, requires that at his peril he must so raise it, and this defense should, therefore, be treated with all the consideration any other class of defenses is entitled to receive. Section 24 of article 1 of the constitution of Nebraska provides as follows: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." The language employed in *Shawang v. Love, supra*, to which we have called attention, ignores this provision of the bill of rights, and cannot, therefore be sustained. That part of the opinion in *Shawang v. Love, supra*, therefore, which lays down the rule that by suing out a writ of error, or appealing to this court, the defendant waives all errors of want of jurisdiction and thereby submits himself to the jurisdiction of the district court, is overruled. The judgment of the district court is

REVERSED.

39	180
42	633
39	180
44	9
44	221
39	180
45	95
39	180
46	260

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LOUIS P. REYNOLDS, APPELLEE, V. GOULD P. DIETZ  
ET AL., IMPEADED WITH HARRISON BOSTWICK,  
APPELLANT.

FILED FEBRUARY 6, 1894. No. 3968.

1. **Mortgages: PURCHASE OF PREMISES BY TRUSTEE: DEFICIENCY JUDGMENT.** Where several parties purchased real property, the title being taken in the name of one of them as trustee for all the purchasers, and the deed of conveyance to

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him recited, as part of the consideration for the conveyance, that the grantee named as trustee agreed and assumed to pay a mortgage in existence upon the premises conveyed, *held*, that upon an averment of the above facts in the petition there should not be inferred of necessity the conclusion that the *cestuis que trust*, for whom the trustee was acting, were individually liable for a deficiency which might remain unsatisfied upon the foreclosure sale of the mortgaged premises. Following *Reeves v. Wilcox*, 35 Neb., 779.

2. An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence. Following *Rockwell v. Blair Savings Bank*, 31 Neb., 128.
3. **Cestuis Que Trust: FINDING UPON CONFLICTING EVIDENCE: REVIEW.** In the trial court there was evidence that the agreement of the trustee, in whom was vested the title, that he would assume and pay an existing mortgage, was made upon the authority of and to bind the *cestuis que trust*, contradicted by other evidence upon that proposition. *Held*, That the finding of the trial court in favor of said *cestuis que trust* should not be disturbed.
4. **Bill of Exceptions: SETTLEMENT BY CLERK.** A clerk can settle a bill of exceptions upon agreement of parties only when the unanimous consent of all the parties interested is shown by a stipulation to that effect attached to the proposed bill of exceptions, signed either by the parties themselves or their attorney of record in the case wherein the bill is proposed, or by an attorney or agent whose special authority to sign is affirmatively shown.
5. A bill of exceptions to be settled by the clerk upon agreement of parties, must be acted upon by such clerk within the time fixed by statute, or within the time allowed by the court or judge for the settlement of such bill of exceptions.

REHEARING of case reported in 34 Neb., 265.

*M. A. Hartigan*, for appellant.

*J. B. Cessna, W. P. McCreary, Capps, McCreary & Stevens*, and *Talbot & Bryan*, for appellees.

**RYAN, C.**

There was filed in this case an opinion which was reported in 34 Neb., 265, *et seq.* Subsequently a rehearing was granted, and the case fully reargued and again submitted for the determination of this court. The history of the transactions out of which it arose is correctly given in the already reported opinion, and need not now be reiterated. Upon a careful examination of the evidence in connection with the pleadings, we are satisfied that some very material, and, indeed, essential, facts have been overlooked. Of this nature is this statement in the opinion referred to: "In the case at bar the proof clearly shows that the *cestuis que trust* named each purchaser and paid for one-tenth portion of the land and agreed to pay the mortgage as a part of the consideration." As to the agreement of the *cestuis que trust* to pay the mortgage as a part of the consideration, the only affirmative evidence was given by H. Bostwick. He said that the receipts given by him to the *cestuis que trust* were uniform each with the other; that the aggregate amount of the receipts was paid as part of the consideration for the deed to himself as trustee; that the property was bought subject to a mortgage of \$8,600, and that each party then agreed to assume his part of the existing mortgage; that the property was put in at \$20,000, subject to a mortgage of \$8,600 and interest, each party paying his share of the balance in cash. On his cross-examination Mr. Bostwick testified as follows:

Q. These receipts were all the written articles you had between these other parties?

A. No, sir; I had a written agreement, and it ought to be in existence to-day, signed by all of them, stating the description of the property, amount of purchase money and the mortgage, and corroborating me as trustee; and everything in it the same as in the receipts, only more fully set out. It was signed by every one here and by Mr. Halter

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for the Lincoln parties. I have looked for it but cannot find it. I have looked everywhere it is possible for it to be. It is possible that a contract of that kind was drawn and signed at the time the bill was made.

Q. The receipts therein date from the 10th to the 16th?

A. Yes, sir.

Q. And the deed was recorded on the 20th. Now where was the money paid?

A. Well, it was paid right here, but some of the Lincoln parties held some papers. All payments were made right here and the whole deal was fixed up here. I had never met the Lincoln parties; I think I met Mr. Hyde, and I did it all through Mr. Halter for them. He gave a check for the money for them. I think he gave a check for four of them at the same time.

Q. These receipts stated all agreements as far as it stated anything at the time?

A. Yes, sir.

Q. You are the one that was arranging in getting up the syndicate, were you?

A. Yes, sir.

Q. In this agreement they all agreed to assume their proportionate share of the mortgage?

A. Yes, sir.

Q. The mortgage was part of the purchase money to be paid subsequently?

A. Yes, sir.

Q. If the land was not sold?

A. Yes, sir.

Q. Will you swear that you went into all these details?

A. Yes, sir; it was stated in this way in the contract. Now to refer to another deal, the contract drawn out here (pointing to the east part of the city), it was for each one to pay such a share and then to assume any outstanding incumbrance. This was drawn up in the same way. The article set out that they took the property at so much

and assumed a mortgage for so much, and went on that way.

In contradiction of this evidence James C. Kay testified as follows:

Q. Have you the original memoranda made at the time you purchased your interest in June, 1887?

A. Yes, sir (producing check marked Exhibit J).

Q. What is that?

A. A check on the bank that I gave for the \$140.

Q. Who drew that check up?

A. Mr. Bostwick.

Q. Did you sign any other paper?

A. No, sir.

Q. Did you sign any such paper or agreement as has been referred to in the testimony of Mr. Bostwick?

A. I don't remember anything of the kind.

W. H. Fuller testified as follows:

Q. You heard the testimony of Mr. Bostwick?

A. Yes, sir.

Q. State to the court when, if ever, you signed the written agreement giving authority to him as he has testified to.

A. I never signed any.

Joseph Boehmer testified:

Q. You heard the testimony of Mr. Bostwick?

A. Yes, sir.

Q. Did you ever sign any such agreement as he refers to?

A. No, sir.

Q. State if you ever had any conversation about such an agreement.

A. Mr. Halter said he had such an agreement, but that he would not sign it for himself, nor would be for any other.

Q. Where was that conversation?

A. In the bank at Lincoln.

Q. Did you act for Mr. Brotherton?

A. Yes, sir.

Q. Did you ever authorize any one to sign any such instrument for Mr. Brotherton?

A. No, sir.

The receipts referred to by Mr. Bostwick *mutatis mutandis* were in the following language :

"No. ———.

JUNE 18, 1887.

"Received of W. H. Fuller, five hundred and seventy dollars, being one-twentieth interest in S.  $\frac{1}{2}$  S. E.  $\frac{1}{4}$  section 8-7-9, Adams county, Nebraska, subject to a mortgage for \$3,600 and interest thereon from March 29, 1887.

"\$570.

H. BOSTWICK, *Trustee*."

So far as any written instrument shows, there was no undertaking on the part of the *cestuis que trust*, personally, to pay the mortgage upon the property purchased. The evidence of Mr. Bostwick of a written agreement having been signed by all the parties, weakened as it was by his failure to produce or account for the absence of that very material writing, moreover, was flatly contradicted upon this very material point. It can scarcely escape notice that the petition made no reference to an express undertaking of the *cestuis que trust* to pay the mortgage, either written or otherwise. The averment nearest approaching this was "that the deed was taken by H. Bostwick for the *cestuis que trust* named and was made to H. Bostwick, and at the special instance and request of the said *cestuis que trust*, the other defendants aforesaid, the said H. Bostwick agreed and assumed to pay this mortgage of \$8,600 to the plaintiff aforesaid; that by said deed, and the acceptance thereof, the said H. Bostwick and the *cestuis que trust*, defendants aforesaid, did assume and become personally responsible for the payment of said mortgage," etc. The evidence of Mr. Bostwick was therefore not merely contradicted, but was entirely irrelevant to the averments of the petition; for in the petition no claim was made that the *cestuis que trust* agreed to

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pay the mortgage, but only that from their relations with Mr. Bostwick that undertaking should be implied. The proofs which we have noticed had no tendency to support any averment of the petition, and, therefore, should have been disregarded. (See *Lipp v. Horbach*, 12 Neb., 371; *Hobbie v. Zaepffel*, 17 Neb., 548; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 314; *Uppfalt v. Nelson*, 18. Neb., 533; *Merchants Bank v. McConiga*, 8 Neb., 245; *German Ins. Co. v. Fairbank*, 32 Neb., 750.)

In *Smith v. Wigton*, 35 Neb., 460, MAXWELL, C. J., delivering the opinion of this court, said: "The issue presented by the amended pleadings is the receipt and retention of more than \$3,000 of plaintiff's money by the defendants. The proof clearly shows that they collected more than \$10,000 on a judgment in favor of the plaintiff, and that they still retain more than \$3,000. If this is retained in pursuance of a contract to that effect, it should be pleaded." As an original question, it might, perhaps, have admitted of doubt whether or not in a suit for the foreclosure of a mortgage the personal liability of purchasers who have assumed and agreed to pay such mortgage upon the premises should be enforced. This proposition, however, is now beyond question, for in *Cooper v. Foss*, 15 Neb., 515, the rule was thus laid down: "The holder of a note and mortgage where a third person has bought the mortgaged premises, and as the whole or a part of the consideration therefor has agreed with the mortgagor to pay the mortgage debt, can sue such third person therefor with or without foreclosure, or, upon foreclosure, if there is a deficiency, can take judgment against him therefor." This doctrine is approved in *Rockwell v. Blair Savings Bank*, 31 Neb., 128. The liability is enforced because the purchaser assumes and agrees to pay a sum certain secured by the mortgage. In the case last cited this liability was enforced, although it depended for proof upon oral evidence alone. This is upon the theory, doubtless,

that, under the circumstances proved, the promise was an original promise, and therefore required no writing to evidence its existence. It is proper to join all grantees subsequent to the recording of a mortgage as defendants in a foreclosure thereof, and having been joined as a defendant the liability of one who has assumed payment of such mortgage may be enforced by a personal or a deficiency judgment, upon the theory that the court having jurisdiction in equity of the subject-matter for one purpose will afford a complete remedy as between all parties to the action. It is unnecessary to determine whether or not if the petition had stated fully the facts which it is claimed rendered liable the *cestuis que trust*, such *cestuis que trust* would have been proper parties against whom a personal or deficiency judgment could, upon proper proofs, have been rendered liable, for such facts were not pleaded, as has already been noted. The relation of these *cestuis que trust* to the purchase and consideration thereof, as stated in the petition, did not render them liable to a personal judgment in this action. Whether or not they might be liable personally for the deficiency is also doubtful, but is not a question which need be discussed, for no such judgment had been rendered at the time this appeal was taken. Indeed, none such has ever been rendered. A deficiency judgment could not be taken until a sale had been had and thereby the amount of the deficiency ascertained. It is true that a sale was had after the judgment appealed from was rendered and before the appeal to this court, but even after that sale there were no proceedings in the district court with a view of ascertaining or enforcing the liability alleged as against the appellees for a deficiency. The appeal was taken from a judgment whereby the court failed to declare a deficiency liability claimed to have been fixed before such ascertainment of liability was possible. On this appeal, therefore, it is impossible to hold the appellees as for a deficiency, for the very good and sufficient reason that that question was

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never presented to or passed upon by the district court. As has already been shown, no mere personal judgment could be rendered against the appellees on the averments of the petition. Even had these averments been sufficient to authorize such a judgment, there was a direct conflict in the testimony as to whether or not the *cestuis que trust* assumed the payment of the mortgage upon the premises purchased. This being true, the finding of the district court in favor of the appellees, must be sustained in this court (*Worthington v. Worthington*, 32 Neb., 334), and this case must be governed by the principles enunciated by MAXWELL, C. J., in *Reeves v. Wilcox*, 35 Neb., 779. The pleadings and proof being in the condition which we have stated, the district court very properly held that no judgment could be rendered against the *cestuis que trust* for which they would be held individually liable.

Ordinarily it is unnecessary to consider the manner in which a bill of exceptions has been settled in determining the merits of a case on rehearing. In this case, however, this becomes necessary on account of the facts to which reference will hereinafter be made, and because the service of the proposed bill of exceptions upon H. Bostwick, trustee, was in the reported opinion held sufficient, for the reasons stated in the following language: "The action was brought by the plaintiff against all the defendants to subject the land in suit to the satisfaction of the mortgage. The trustee represented the *cestuis que trust*, and except in a contest between them, service of the bill of exceptions on him will be sufficient." In this case H. Bostwick filed no answer as trustee or otherwise. He filed a demurrer to the petition, which demurrer was overruled, and, as the record recites, there was judgment as to Bostwick on his demurrer. He had therefore no interest in the trial of the case upon the contested facts, for judgment had already been rendered against him upon a trial of questions of law. It is, however, incorrect to assume that the service of the proposed bill of ex-

ceptions was made upon Mr. Bostwick alone. It is true that he was represented by M. A. Hartigan, Esq., but the same attorney appeared for Everett C. Sawyer and Alice E. Sawyer. For Everett C. Sawyer it was averred in his answer "that he, with the other defendants herein, purchased the lands described in the plaintiff's petition, since the making of the note and mortgage set out in plaintiff's petition, and at the time of such purchase this defendant was made trustee for the interest and estate of his co-defendants in said lands, to care for and manage the same, and that as such trustee he entered upon and took charge of the execution thereof, and in all things faithfully, prudently, properly, and in good faith administered the same as was most advantageous and beneficial; that he has laid out, incurred, and expended labor, time, attention, and care in the discharge of said trust, and paid out moneys therefor in the sums and amounts following:

"Services as trustee.....	\$500 00
"Defense in present suit .....	100 00
"Legal counsel and service.....	400 00
"Amount .....	\$1,000 00"

Following this statement is the averment that no part of the \$1,000 has been paid, with a prayer for the enforcement of the above claim. The answer of Alice Sawyer consisted of a denial of the averments of the petition upon information and belief, followed by a disclaimer of any interest whatever in the land described in the petition. The so-called "bill of exceptions" itself, on its title page, recites the appearances as follows:

- "J. B. Cessna, as counsel for plaintiff."
- "M. A. Hartigan, counsel for defendants Sawyer."
- "Capps & McCreary, counsel for defendants Kay, Levy, Loeb, and Fuller."
- "—— Bryan, Esq., counsel for defendants Halter, Boehmer, Hyde, and Brotherton."

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The memoranda upon which the proposed bill of exceptions was settled were as follows:

"HASTINGS, July 11, 1889.

"Received the within bill of exceptions from M. A. Hartigan this day for inspection and amendment, to the end that the same may be settled and filed in said case.

"J. B. CESSNA,  
*"Attorney for Plaintiff."*

"HASTINGS, July 20, 1889.

"Received this bill of exceptions in return from J. B. Cessna, Esq., without suggesting amendments or corrections.

M. A. HARTIGAN,  
*"Attorney for Defendants, Appellces."*

"HASTINGS, NEBRASKA, July 31, 1889.

"I enter my appearance in the supreme court and waive service of process; and it is hereby stipulated and agreed between the parties hereto and their attorneys aforesaid, that this bill of exceptions may be signed and settled by the clerk of the district court of Adams county, Nebraska.

"J. B. CESSNA,  
*"Attorney for Plff."*

"M. A. HARTIGAN,  
*"For Dfts."*

Upon the alleged bill of exceptions was the following indorsement:

"STATE OF NEBRASKA, } ss.  
 ADAMS COUNTY. }

"The foregoing bill of exceptions taken and preserved in this action, and the same containing all the evidence offered or given by either party on the trial thereof and upon the stipulation herewith returned, allowing the clerk to settle and sign the same, said bill of exceptions is this day allowed, signed, and filed, and in all things made part of the record in this case.

"Dated July 31, 1889.

J. H. SPICER,  
*"Clerk District Court."*

At the date of the decree, May 21, 1889, there was allowed forty days in which to settle a bill of exceptions. The earliest acknowledgment of the receipt of the proposed bill was on July 11, 1889, fifty-one days after May 21 aforesaid, no extension meantime having been allowed beyond the original forty days.

Attention has been called to some of the various anomalies which appeared in the alleged settlement of the bill of exceptions, of which nature is, first, the fact that Mr. Hartigan served it upon the attorney for plaintiff July 11, 1889; second, that Mr. Hartigan acknowledged receipt of the same proposed bill of exceptions on July 20, 1889, for the purpose of settling the same; third, that both these attorneys then in unison agreed that the proposed bill might be settled by the clerk, by whom alone it is authenticated; fourth, that the appellees who most strenuously insist upon the correctness of the judgment of the district court, have never in this case, either in the trial court or in this court, been represented by Mr. M. A. Hartigan; fifth, that notwithstanding this fact, the only consent on behalf of said appellees is the consent evidenced by Mr. Hartigan's signature in their behalf. The power to settle a bill of exceptions is delegated to the clerk (except in the event of the death, sickness, or absence of the trial judge) only in cases where all the parties in interest agree upon the bill of exceptions and when it shall have attached a written stipulation to that effect. (Sec. 311, Code of Civil Procedure.) In this the clerk exercises no judicial function in determining the correctness of the bill itself. Its force is due solely to the agreement assented to by all the parties interested. If this essential element of unanimity is wanting, or if the proposed bill is not assented to on behalf of all parties in interest, it is not binding as a bill of exceptions. Where a proposed bill is presented within proper time to one of the principal adverse parties, it is a sufficient compliance with the statute authorizing the presiding judge to settle

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the bill, even though all the adverse parties have not been served therewith. (*Crane Bros. Mfg. Co. v. Keck*, 35 Neb., 683.) In this respect there is a radical difference dependent upon whether the proposed bill is to be authenticated by the clerk or by the presiding judge, for the latter has a certain latitude. The former can only act upon the unanimous consent of all parties in interest. There was lacking this consent on behalf of several parties interested, and the bill of exceptions should therefore have been quashed upon the motion made for that purpose. The judgment of the district court is

AFFIRMED.

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CHARLES REDFIELD V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1894. No. 5895.

**Rape: REVIEW OF EVIDENCE.** Where the only question presented was as to the sufficiency of the evidence to sustain the verdict, and there is found ample evidence in its support, the judgment of the district court must be affirmed.

ERROR to the district court for Holt county. Tried below before KINKAID, J.

*R. R. Dickson*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

RYAN, C.

The plaintiff in error, a married man, was tried in the district court of Holt county and found guilty of the crime of rape committed upon the person of Minnie Muesch. At the time the crime charged was committed the victim was of the age of fourteen years. The only question ar-

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gued in this court is that the evidence did not sustain the verdict. On behalf of the plaintiff in error the testimony was in proof of such a condition of drunkenness at the time of the alleged offense as to render physically impossible the crime charged. Probably owing to a limited knowledge of the English language, the testimony of the prosecuting witness was given in such terms as to preclude its reproduction in print, except, perhaps, in the brief for plaintiff in error, wherein it is given with great apparent gusto. This testimony, however, was straightforward and convincing, was corroborated by other evidence, the aggregate being amply sufficient to sustain the verdict of the jury. The judgment of the district court is

AFFIRMED.

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MAGNUS WEBER V. FREEMAN P. KIRKENDALL ET AL.

FILED FEBRUARY 6, 1894. No. 5050.

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**Involuntary Payment: RECOVERY: INTIMIDATION AND FRAUD.** Thursie, Anderson & Flodman owned a shoe store and became indebted to defendants in error in the sum of \$840.70, to secure which they held the individual note and mortgage of Thursie. This firm sold out to Johnson & Flodman, and it in turn sold to Flodman & Bruce, and this last firm also became indebted to defendants in error in the sum of \$820.71, and while so indebted sold out to plaintiff in error, who assumed their debt. Thursie and his attorney and the defendants in error and their attorney induced plaintiff in error to come to their place of business, when they took him to a room, not their office, on the fifth floor of their business house, and there falsely claimed that he was liable to them for the old debt of Thursie, Anderson & Flodman, and demanded that he pay it then and there, and by their acts and expressions led the plaintiff in error to believe that if he did not pay them the claim demanded, they would attach his shoe store; and, influenced by such fears, plaintiff in error paid defendants in error the debt owing them by Thursie, Anderson

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& Flodman. *Held*, That the payment, while not technically made under duress of property, was without consideration, was extorted from plaintiff in error by intimidation and fraud, was not voluntarily made, and might be recovered back.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

The facts are stated in the opinion.

*Charles W. Haller*, for plaintiff in error:

Although the facts may not be such as to make this a case of technical duress, it amounts to undue influence, and the plaintiff should recover. (*Spaulds v. Barrett*, 57 Ill., 289; *Dykes v. Wyman*, 34 N. W. Rep. [Mich.], 561; *Lafayette & I. R. Co. v. Pattison*, 41 Ind., 312; *Collins v. Westbury*, 2 Bay [S. Car.], 211; *Chandler v. Sanger*, 114 Mass., 364; *Sartwell v. Horton*, 28 Vt., 370; *Munson v. Carter*, 19 Neb., 293; *McLin v. Marshall*, 1 Heisk. [Tenn.], 678.)

*Montgomery, Charlton & Hall, contra*, cited: *Wolfe v. Marshal*, 52 Mo., 167; *McClair v. Wilson*, 31 Pac. Rep. [Col.], 502; *Murphy v. Creighton*, 45 Ia., 179; *Peckham v. Hendren*, 76 Ind., 47; *Hilborn v. Bucknam*, 78 Me., 482; *Mundy v. Whittemore*, 15 Neb., 651; *Sieber v. Weiden*, 17 Neb., 583; *King v. Williams*, 21 N. W. Rep. [Ia.], 502; *Higgins v. Brown*, 78 Me., 473.

RAGAN, C.

Magnus Weber, on the 3d day of October, 1888, purchased of Flodman & Bruce a retail shoe store in the city of Omaha, and assumed an indebtedness of \$820.71 which his vendors then owed Kirkendall, Jones & Co. Flodman & Bruce had purchased this store of Johnson & Flodman, and they purchased the store of Thursie, Anderson & Flodman. While the latter firm owned the store it became indebted to Kirkendall, Jones & Co., and

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\$848.70 of said debt remained unpaid at the time Weber became the owner of the store. This latter amount, Weber did not assume by the purchase he made of Flodman & Bruce. On the 8th day of October, 1888, Kirkendall, Jones & Co. induced Weber to come to their place of business, and on reaching there he was taken to a room, not their office, on the fifth floor of their business house, where were one of the firm of Kirkendall, Jones & Co. and their attorney, and Mr. Thursie and his attorney. At this time and place Kirkendall, Jones & Co. and their attorney falsely claimed to Weber that he was liable to them for the \$848.70, the debt owing them by the old firm of Thursie, Anderson & Flodman, and demanded that he pay the same, which Weber then did by assigning to them a certificate of deposit of an Omaha bank, which certificate was then owned by him. Weber then brought this suit against Kirkendall, Jones & Co. to recover the money represented by said certificate of deposit, alleging that he had surrendered it involuntarily to Kirkendall, Jones & Co. while unlawfully restrained of his liberty by them, and in fear of threats made by them if he did not pay Thursie, Anderson & Flodman's debt, that they Kirkendall, Jones & Co. would seize, by attachment, his shoe store. The case was tried to the court, a jury being waived. The court made certain special findings and found generally for Kirkendall, Jones & Co., and Weber brings the case here on error.

The special findings made by the court, material here, are as follows: That Kirkendall, Jones & Co. made no direct threat to attach Weber's store, but by their acts and expressions they led him to believe that they would attach his stock of goods if he did not pay the \$848.70 claimed; that Weber would not have paid this claim had he not believed from the acts and statements made by Kirkendall, Jones & Co. that they intended to attach his shoe store if he did not pay it; that the money paid by Weber was not

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for a debt he owed Kirkendall, Jones & Co., but was the debt of another. These special findings of the district court, and the evidence in the record, establish this: That Kirkendall, Jones & Co. knew that Weber was not legally liable for the claim which they induced him to pay, and that Weber made this payment because he feared that if he did not make it that Kirkendall, Jones & Co. would attach his shoe store and ruin his business, and that this fear was fixed in Weber's mind by the acts and statements of Kirkendall, Jones & Co., and their attorney, at the conference above referred to. The precise question then is, was this payment made by Weber voluntarily? In this case the honesty of Weber's claim is not denied. It is defended against here by the defendants in error on technical grounds throughout; the principal ground of defense being that the payment was voluntarily made. It is undoubtedly a general rule that money paid voluntarily, without fraud and with a full knowledge of all the facts, cannot be recovered back by the party who has so paid it. There are, however, many exceptions to this rule, or rather instances in which the payments, having been made under a pressure of an enforced emergency, are not considered voluntary but compulsory in law. (*Cobb v. Charter*, 32 Conn., 358.) In that case the defendant had possession of a chest of tools belonging to the plaintiff, who was a mechanic, and refused to give up the chest unless plaintiff would pay a bill for board which defendant had against the plaintiff's son and for which the plaintiff was in no manner liable. To get possession of his chest of tools, Cobb paid the board bill, and the court held that it was not voluntarily paid and that it might be recovered back.

In *Chandler v. Sanger*, 114 Mass., 364, it is said: "A payment by a person to free his goods from an attachment, put on for the purpose of extorting money by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back."

In *Vyne v. Glenn*, 41 Mich., 112, the defendant compelled plaintiff to make a settlement with him and to forgive certain moneys which the defendant lawfully owed the plaintiff, by informing the plaintiff that he had stopped payments of certain moneys due the plaintiff from third persons, knowing at the time that if plaintiff failed to get these moneys owing him, he would be financially embarrassed or perhaps ruined. It was held that the settlement made was obtained by duress and would be set aside and the defendant compelled to pay the moneys to plaintiff which the plaintiff had forgiven him in the settlement made.

In *Spaids v. Barrett*, 57 Ill., 289, goods were wrongfully taken from the owner thereof by means of a writ of attachment fraudulently obtained, and the party in possession refused to surrender the goods on payment of the sum actually due, but demanded more than twice that amount, as a condition of his releasing the attachment and surrendering possession of the goods. The owner paid the sum demanded, and the court held that it was not voluntarily paid and might be recovered back.

In *Adams v. Schiffer*, 11 Col., 15, Adams agreed to convey to Schiffer an interest in certain mining property by a deed passing a good title. In pursuance of this agreement he gave Schiffer a quitclaim deed, which he accepted. A third party made an unfounded claim to the property, which Schiffer bought up. At the time Adams was a depositor in Schiffer's bank, and Schiffer compelled him, by refusing to pay his checks, to settle for part of the sum paid by Schiffer to such third party. The court held that such a payment was involuntary.

These authorities establish the rule that an illegal payment made by one in order to obtain his property from another who has possession of it, and refuses to surrender it unless such payment is made, is not a voluntary payment and may be recovered back. Counsel for defendants in error admit the correctness of this rule, but say, however,

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that it is not applicable to the facts in the case at bar, since defendants in error did not, at the time they compelled Weber to make the payment to them of the debt owing them by Thursie, Anderson & Flodman, have possession of Weber's store; but we cannot appreciate this distinction. What is the difference in principle whether defendants in error unjustly compelled the plaintiff in error to pay a debt which he did not owe them by fixing and inducing in his mind the reasonable fear that if he did not pay it they would attach his store, and going in the first instance and attaching his goods and then refusing to release them unless he would make the payment demanded? Either method of obtaining this money was equally unlawful. It must be borne in mind that this record shows that this claim made by defendants in error on the plaintiff in error was illegal and unjust, and unfounded, and defendants in error knew that. It was an old debt of Thursie, Anderson & Flodman's, and defendants in error, at the time they compelled the plaintiff in error to pay it, had the individual note and mortgage of Thursie to secure this debt. Nowhere is there any pretense or claim made that the sale from Thursie, Anderson & Flodman to Johnson & Flodman, or the sale from Johnson & Flodman to Flodman & Bruce, or the sale from Flodman & Bruce to Weber was fraudulent. When Weber bought this store of Flodman & Bruce he assumed a debt of some eight hundred dollars which that firm owed the defendants in error, and called on them and told them he had bought the store and made a payment upon the debt. Counsel for defendants in error say that no precedent can be found allowing money to be recovered back which has been paid because the party paying it feared that if he did not, the party who demanded the payment would seize his property by legal process. I have no doubt that when the first case arose to recover money back which had been extorted from the owner by one in possession of his property, in order to in-

duce such extortioner to release possession of the property, that counsel who defended in the case made the argument that no precedent could be found allowing such payment to be recovered back, and that it was a voluntary payment, and that in order to entitle such party to recover, he must show that he made the payment by reason of fear of loss of life or irreparable injury to his person. But it seems that the court was equal to the emergency and made a precedent, and from this time forth a precedent will be found in the case of *Weber v. Kirkendall*, 39 Neb., 193, allowing money to be recovered back which a party has paid by reason of fears that if he did not pay it the party who made the demand would attach his goods.

To do anything voluntarily means to do it with one's free will and without fear or compulsion of mind or body. The court will not shut its eyes to the every-day transactions of life. Here was a young man in business. A demand is made upon him that he pay some eight hundred dollars that another owes. He protests that he does not owe it. He asks that he be given time to consider the matter and consult his friends. He is told by defendants in error that he must not leave the building until this matter is settled; that it must be settled here and now. We are now asked to say that he paid this money voluntarily because he did not resist the illegal and unjust demands of defendants in error and allow them to attach his store. But what did the attaching of plaintiff's store mean to him? If he had other creditors it would have alarmed them; it would have closed his place of business; it would stop his trade; it would probably financially ruin him, and it would destroy his financial credit and reputation,—something more valuable to a business man than money itself. If he weighed and considered these matters he would have very reasonably concluded that from a financial standpoint it was not so bad for him to submit to the unjust demand of the defendants in error as to have his business ruined.

It is said by counsel for defendants in error that he should have refused their demand and allowed them to attach his store, then resisted the attachment in the courts, or sued them for a wrongful attachment of his property. But this is a two-edged sword, and the answer to this argument is that the defendants in error, having illegally determined to compel this plaintiff in error to pay them the debt which he did not owe, might, at least, have had consideration enough for plaintiff in error to, in the first instance, bring their attachment suit against the property to establish their unfounded claim. By doing so they would at least have left the plaintiff in error in the possession of his money with which to have resisted the collection of their unfounded claim. But this record discloses not only that defendants in error have in their possession money unlawfully demanded and unlawfully obtained from plaintiff in error, but the conference held in the business house of defendants in error, and the parties at that conference, are not without significance. Why should Mr. Thursie and Mr. Thursie's attorney be there? Was this a conspiracy between Thursie and the defendants in error to compel the plaintiff in error to pay Thursie's debt to them? We do not say that it was, but it looks very like it. This money which defendants in error have extorted from plaintiff in error may not have been obtained by duress of property, technically speaking, but it was obtained from him involuntarily. It was obtained by a species of intimidation, fraud, and compulsion, and no court of equity will permit them to retain it. If this had been a debt which plaintiff in error owed them, then, had he paid it under the fear that if he did not his goods would have been attached, the case would be entirely different. But the controlling facts in this case are that it was not his debt, and that it was not voluntarily paid.

The decree of the district court is reversed and a judgment will be rendered in this court in favor of the plaintiff

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in error against the defendants in error for the sum of \$765.25, with seven per cent interest thereon from the 9th day of November, 1888, and costs of suit.

JUDGMENT ACCORDINGLY.

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89	201
44	633

DAVID M. HAVERLY ET AL. V. MARGARET J. ELLIOTT.

FILED FEBRUARY 6, 1894. No. 5065.

1. **Unlawful Sale of Stock of Goods by Receiver: MEASURE OF DAMAGES: INSTRUCTIONS: CONVERSION.** Plaintiff owned and conducted a confectionery store and manufactured and sold ice cream and soda water. She also owned a stock of confections, and a miscellaneous lot of furniture and fixtures, used in her business, such as tables, chairs, shelving, counters, ice cream freezers, tableware, and soda fountain. One Haverly held a lien against this property for about \$250, and brought a suit in equity to foreclose it, and obtained the appointment of a receiver, who took possession of plaintiff's property and place of business, and held them for some days and then sold the property to pay Haverly's lien. It having been finally decided that the order appointing the receiver ought not to have been granted, the plaintiff sued Haverly and his sureties on the bond given by them to obtain the appointment of such receiver. *Held*, That the instructions of the district court, that the plaintiff's measure of damages was (1) the value of her interest in the property sold by the receiver at the time he took possession of the same, and (2) the actual loss she sustained by the suspension of her business during the time she was prevented from carrying it on by reason of the possession held by the receiver of her property and place of business, were correct.
2. **A motion for a new trial in the language of the statute is sufficient, but no error will be considered in this court which is not specifically assigned as such in the petition in error.**
3. **Objections to the admission or exclusion of evidence, to be available, should be made at the time such evidence is offered, and a motion made after the trial closes, to strike out certain evidence, should be overruled.**

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated in the opinion.

*Holmes & Macomber*, for plaintiffs in error, contending that the instructions directing the jury to allow damages for injury to business are erroneous, and that the verdict is not supported by the evidence, cited: *Lawrence v. Hagerman*, 56 Ill., 77; *Campbell v. Chamberlain*, 10 Ia., 337; *Lowenstein v. Monroe*, 55 Ia., 82; *Watson v. Sutherland*, 5 Wall. [U. S.], 74; *North v. Peters*, 138 U. S., 271; *French v. Ramge*, 2 Neb., 257.

*Henry D. Estabrook*, *contra*, to sustain the instructions, cited: *Meyer v. Fagan*, 34 Neb., 184; *Bruce v. Coleman*, 1 Handy [O.], 515; *Munnerlyn v. Alexander*, 38 Tex., 125; *Hoge v. Norton*, 22 Kan., 374; *Wood v. State*, 66 Md., 61; *Muller v. Fern*, 35 Ia., 420; *Gear v. Shaw*, 1 Pin. [Wis.], 608; *Chicago City R. Co. v. Howison*, 86 Ill., 215; *Lange v. Wagner*, 52 Md., 310.

RAGAN, C.

In the month of August, 1885, Margaret J. Elliott was engaged, in the city of Omaha, in conducting a confectionery store and in the manufacture and sale of ice cream and soda water. She owned a soda fountain, some tables, chairs, shelving, ice cream freezers, tableware, and other fixtures and furniture necessary to the conduct of such business, and had on hand some confections, fruits, and cream. One Haverly on the 14th of this month had a lien against this property for about \$250, and brought a suit in equity in the district court of Douglas county against Mrs. Elliott to foreclose this lien. He made application for, and had appointed, a receiver, who took possession of this property of Mrs. Elliott and also took possession of her place of

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business, closed the same up, put the place and property in the care of an attendant, and so kept it for some eleven days. He then sold the property to raise the money due Haverly on his lien. By the decree rendered in the case brought by Haverly it was decided that the order appointing a receiver ought not to have been granted. Mrs. Elliott brought this suit for damages against Haverly and the sureties on his bond, given to obtain the appointment of said receiver. There was trial to a jury and a verdict in favor of Mrs. Elliott for \$1,000. The district court overruled a motion for a new trial, rendered judgment on the verdict, and Haverly and his sureties bring the case here on error.

There are three points relied on by plaintiffs in error for a reversal of this judgment:

(1.) Improper admission of evidence on the trial in behalf of the defendant in error.

(2.) Erroneous instructions given by the court to the jury.

(3.) That the verdict is not sustained by sufficient evidence and is contrary to law.

The complaint made by counsel for plaintiffs in error as to the wrongful admission of evidence is thus stated by them in their brief: "Upon the trial to the jury the defendant in error introduced, over the objection of the plaintiffs in error, testimony tending to show the nature and volume of the business, the length of time the business was suspended, and the amount of profit that was made on certain sales. (See record, interrogatories 12, 14, 18, 250, 254, and 268.)" But the only error assigned in the petition in error on the subject of evidence is as follows: "The court erred in overruling the motion to exclude the testimony offered by the defendant Elliott at the trial, tending to establish the good-will of the business in issue." The questions which counsel say, in their brief, the court erred in permitting to be answered are not referred to in their peti-

tion in error, and for that reason we cannot review the ruling of the district court in permitting those questions to be answered. Once more we desire to call the attention of the bar of the state to the oft-repeated rulings of this court, that in order for a litigant to obtain a review of an alleged error made by the district court in the admission or rejection of testimony, such alleged error must be specifically alleged in the petition in error filed here. A motion for a new trial in the language of the statute is sufficient, but no error can be considered in this court which is not assigned as an error in the petition in error.

As to the error which it is alleged the court committed in overruling counsel's motion to exclude evidence offered by the defendant Elliott tending to establish the good-will of the business, there are several things to be said:

Repeated examinations and readings of all the evidence of the defendant in error fail to disclose that the Elliotts, or either of them, gave any testimony on behalf of the defendant in error as to the value of the good-will of Mrs. Elliott's business. It is true that they testified as to the length of time that the place of business was closed; as to the volume of business that was being done at the time the receiver took possession; of the amount of sales per day, and of the expense of conducting the business; but this evidence did not come within the motion made by the plaintiffs in error, the overruling of which is alleged here as error. "Good-will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." (Anderson's Dictionary of Law.) Again, this motion of plaintiffs in error was made

after all the evidence on both sides of the case had been taken and both parties had rested. Now, if one of the Elliots had testified on the trial as to the value of the good-will of Mrs. Elliott's business, counsel should have objected then and there to such testimony, if they thought it incompetent. It will not do to wait until the evidence is all in and the trial closed, and then, by a general motion, move to exclude testimony on a certain subject; and for that reason the court below did not err in overruling this motion. It remains also to be said that the court specifically instructed the jury that they could not allow Mrs. Elliott anything for the value of the good-will of her business. So that, in any view that we may take of this assignment, the plaintiffs in error have not been prejudiced by the ruling of the court.

Counsel for plaintiffs in error also insist that the trial court erred in giving certain instructions to the jury. The instructions complained of are as follows:

"4. The elements of damage for which plaintiff is entitled to recover consist (1) of the injury to her business during the time she was prevented from carrying the same on, by the possession taken by the sheriff and the receiver subsequently appointed; (2) of the loss which she sustained, if any, in the sale of said property by the receiver.

"5. You are instructed that you cannot, under the evidence, allow the plaintiff anything for the value of the good-will of the business, nor can you allow anything for profits, as such, which she might have made in the business, but you will consider the nature of the business, the amount which was being transacted at the time, from the circumstances shown by the evidence, and determine therefrom the damages which the evidence satisfies you plaintiff sustained during the time her business was interrupted and interfered with, from the time possession was taken by the sheriff up to the time the receiver gave up possession of the place where the business was carried on. Such

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damages as plaintiff has shown by satisfactory testimony she has sustained by reason of such interruption of her business, she is entitled to recover for."

The substance of these instructions is that Mrs. Elliott was entitled to recover the value of her interest in the property sold by the receiver at the time he took possession of the same, and the actual loss she had sustained by the suspension of her business during the time she was prevented from carrying it on, by the possession taken and held by the receiver of her property and place of business. We are very clear that plaintiffs in error have no reason to complain of these instructions. The law of the state, and the bond given by Haverly and his sureties as well, provided that if it should be finally decided that this receiver was wrongfully appointed, then that Haverly would pay Mrs. Elliott all damages which she might sustain by reason of the appointing of such receiver. The word "all" does not mean some, nor a part, but means the whole; the entire damage; every item of injury; and if profits which Mrs. Elliott would have made but for the interruption of her business cannot be awarded, it is not because the law would not give them to her, but because no sufficiently certain rule of evidence has been discovered by which such damages can be measured. The judgment of the court that this receiver was wrongfully appointed put Mr. Haverly and the receiver in the position of trespassers. They not only closed up this woman's place of business, but they took her property and converted it. Certainly, then, she was entitled to recover the value of her interest in this property, and if she was prevented from carrying on the business in which she was engaged because this receiver took forcible possession of her place of business and excluded her therefrom, it would be a strange rule of law that would not give her as damages such compensation as would put her in as good position as she would have been in had her property and place of business not been taken from her.

In *Chicago City R. Co. v. Howison*, 86 Ill., 215, it is said: "Where one has an established business and has been prevented from carrying it on by another, damages are recoverable for loss of profits which he would have made had his business not been interfered with." (See also *Munnery v. Alexander*, 38 Tex., 125; *Hoge v. Norton*, 22 Kan., 265; *Muller v. Fern*, 35 Ia., 420.) The last case cited was a suit on an injunction bond, and the court held that the plaintiffs were entitled to recover for the loss of time occasioned by the injunction, at the usual rate of wages, provided they used diligence to secure other employment during the time they were prevented from work by said injunction.

Plaintiffs in error also allege that the court erred in giving the seventh instruction to the jury. It is as follows: "If you find from the evidence that the plaintiff sustained no actual damage by reason of the interruption of her business, and that the value of the property did not exceed the liens, your verdict shall be for the plaintiff only for nominal damages. Nominal damages are given, not as compensation for any actual loss sustained, but merely for a violation of a legal right, and should not be in any substantial amount."

It is urged by counsel that this instruction placed the burden of proof upon the plaintiffs in error. We do not think it did. The court had already told the jury that the burden of proof was on Mrs. Elliott to show by a preponderance or greater weight of the testimony what damage she sustained by reason of the appointment of said receiver and his taking possession of her property.

The next assignment of error made by counsel for plaintiffs in error is that the verdict of the jury is contrary to the law and the evidence. We have not time to quote the evidence, but a careful study of it convinces us that it supports the verdict. Indeed, we think that the verdict might have been much larger and still have been sustained, but for the limitation fixed in the bond.

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First Nat. Bank of Omaha v. Krug.

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Finally, it is said by counsel for plaintiffs in error that the petition of Mrs. Elliott contains no sufficient allegation of damages. The allegation in the petition on the subject of damages, after setting forth the facts in the case, is: "And plaintiff avers that by reason of the wrongful appointment of said receiver as aforesaid, that all the property and effects, choses in action, of said business were dissipated and destroyed, and the goods, merchandise and fixtures wasted and consumed by the excessive costs, plaintiff and her children turned out of house and home, and the means of procuring a living, to the damage of plaintiff in the sum of \$5,000." If counsel for plaintiffs in error desired a more specific or itemized statement of damages which Mrs. Elliott alleged she had sustained by reason of the wrongful appointment of the receiver, and his actions in the premises, they should have made application to the district court for an order requiring the petition to be made more specific and certain in that respect. There is no error in the record and the judgment of the district court is

**AFFIRMED.**

IRVINE, C., having been of counsel in the case below, took no part in the decision here.

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**FIRST NATIONAL BANK OF OMAHA V. JOHN A. KRUG.**

**FILED FEBRUARY 6, 1894. No. 5276. .**

**Review: SUFFICIENCY OF EVIDENCE.** There being no question of law involved in the consideration of this case, the evidence examined, and *held*, to support the verdict.

**ERROR** from the district court of Douglas county. Tried below before IRVINE, J.

*Isaac E. Congdon and Joseph R. Clarkson, for plaintiff in error.*

*Morris & Beekman, contra.*

RAGAN, C.

In April, 1889, George Schroeder & Co. were the proprietors and operators of a cold storage warehouse in Omaha, Nebraska. About the 21st day of June of that year John A. Krug stored with Schroeder & Co. four hundred cases of eggs, which Schroeder & Co., for a consideration agreed to be paid by Krug, agreed to keep in a room in said warehouse until the end of the storage season, December 31. The eggs were to be kept in a room the temperature of which should not exceed 38 degrees, and which room was to be kept free from moisture. On the 9th day of September of that year the First National Bank, by virtue of a chattel mortgage given it by Schroeder & Co., took possession of said warehouse and its contents and remained in the possession and operated the same until about the 25th of September. The eggs which Krug had stored in said warehouse were found, about the last of October, 1889, to be in a bad condition and practically unsalable in the Omaha market. About the middle of November following, Krug took the eggs out of the warehouse and shipped them to New York city and there disposed of them at a loss. He then brought this suit against the First National Bank for damages which he alleged he had sustained by reason of the bank's failure, while in possession of said warehouse, to keep the room in which his eggs were stored properly supplied with ice and at a suitable temperature for preserving his eggs, and in not keeping said room in which the eggs were stored free from moisture, by reason of which the eggs became wet, soiled, and mildewed, and injured. There was a trial to a jury and a verdict in favor of Krug, and the bank brings the case here for review.

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Blodgett v. McMurtry.

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The only error alleged is that the verdict is not supported by the evidence. We have carefully read and studied the entire record and have been highly interested in the evidence, but certainly cannot say that the verdict is unsupported by the evidence, or contrary thereto, or against the weight of the evidence. The case was admirably managed by counsel on both sides, and the question of fact in the case fairly and in all respects properly submitted to the jury. It would subserve no useful purpose to quote the testimony at length, or to quote any of it. It might be instructive as a lecture on how to properly store and preserve eggs, and afford useful information as to what is meant by "firsts" and "candling," but the docket of the court is too badly crowded for us to thus consume the time that should be devoted to the consideration of other cases. There is no question of law involved in the case, and we are all of the opinion that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

IRVINE, C., having presided at the trial below, took no part in the consideration here.

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39	210
44	92

HARRISON H. BLODGETT, APPELLANT, V. JAMES H.  
MCMURTRY ET AL., APPELLEES.

FILED FEBRUARY 6, 1894. No. 4677.

1. **Action Quia Timet.** In an action having for its object the declaration of a trust in land in favor of the plaintiff and the quieting of title in him it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and if he fail to do so, the nature of defendant's title, or the existence of any title in defendant, is immaterial.
2. **Pleading.** Under the Code two or more defenses can be inter-

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Blodgett v. McMurtry.

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posed to the same cause of action, provided they are not inconsistent with one another; and they are not inconsistent unless the proof of one necessarily disproves the other.

3. A plea of estoppel may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial.
4. The conclusion of the court in the former opinion in this case, 34 Neb., 782, as to the sufficiency of the evidence, reaffirmed.

REHEARING of case reported in 34 Neb., 782.

*H. H. Blodgett and Thomas Ryan*, for appellant.

*J. R. Webster, Webster, Rose & Fisherdiok, Harwood, Ames & Kelly, and Reese & Gilkeson*, contra.

IRVINE, C.

An opinion affirming the judgment of the district court was filed June 11, 1892, and is reported in 34 Neb., 782, where a sufficient statement of the issues will be found. The case is now presented upon a rehearing.

The argument of the appellant upon the rehearing is directed chiefly to questions of fact. Nearly all the legal propositions presented require for their application a determination of the facts contrary to the general finding of the district court in favor of the defendants. The evidence has been re-examined carefully with relation to the argument upon the rehearing. A detailed review of the proof would be of no service to the profession or the public and will not be made in this opinion. Upon the subject of the trust we are entirely satisfied with the statement made by MAXWELL, C. J., speaking for the court in the former opinion, that "the testimony fails to establish a trust in a clear, unequivocal manner; that McMurtry denies it *in toto*, both in his pleadings and testimony, and there are matters connected with the testimony introduced on behalf of the plaintiff that are not satisfactorily explained, and left the creation of the alleged trust in doubt. It is suf-

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ficient to say that the judgment is not clearly against the weight of the evidence." Upon the issues in regard to the existence of a trust the finding of the district court in favor of the defendants must, therefore, be sustained.

It is argued by appellant that the title proved by McMurtry was not that alleged in his answer. Both by objection made upon the trial to the evidence, and in the argument, appellant claims this as an estoppel against McMurtry's asserting title contrary to the title alleged in his pleadings. The objections and argument really, however, raise a question of variance between the pleading and the proof. But it is not necessary to consider these questions, for the reason that McMurtry asked for no affirmative relief and it was incumbent upon the plaintiff to establish title in himself. This he failed to do, and the proof of McMurtry's title is immaterial. Upon the issues between the plaintiff and the defendants Boggs & Holmes, the failure of proof to establish a trust would be conclusive in favor of these defendants also, irrespective of their plea of estoppel, unless one argument now made by appellant is well founded. That argument is that the plea of estoppel is a confession of the cause of action, and if the estoppel fails, judgment follows in due course against the defendant. In support of this doctrine appellant cites Herman, Estoppel, p. 1415; *Whittemore v. Stephens*, 48 Mich., 574. Herman, at the place cited, is treating of a particular class of pleas by way of estoppel, and the only authority cited by him in support of the doctrine he lays down is the Michigan case cited by appellant. That case is not in point. That was a suit upon a promissory note under the common law practice. At first the general issue was pleaded, then there was a plea *puis darrein continuance* averring a composition under the bankrupt act. The pleadings, taken together, showed a clear departure, and the court was evidently very much perplexed as to how they should be treated. The plea *puis darrein continuance* was said to approach nearer a

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Blodgett v. McMurtry.

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plea in estoppel than anything else, but was held bad for that purpose. Then it was held that it amounted to an abandonment of the former plea, and therefore judgment followed. There is no doubt that this conclusion was correct. The plea was in effect one in confession and avoidance and entirely inconsistent with the general issue. The general proposition stated in the syllabus, that a plea of estoppel admits the cause of action, went entirely beyond the facts of the case and the language of the opinion. We have been unable to find any case holding that a plea of estoppel *in pais* cannot be joined with one amounting to a traverse, where the two are not in their natures inconsistent. Here they are not inconsistent. Boggs and Holmes in the first place deny all the allegations of the petition necessary for the establishment of a trust in the land, and then by way of further defense allege that at the time of their purchase of the land, and before the payment of the consideration, they applied to the plaintiff for information concerning the title, and were then told and assured by the plaintiff that E. Mary Gregory had full authority to sell and convey the land, and they received their conveyance in reliance upon such statement. There is no inconsistency between these two defenses. Under the Code it is firmly established that two defenses are inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent when both may be true, and in such case may be joined under the Code. (Maxwell, Code Pleading, 397.) Boggs and Holmes' plea of estoppel did not conflict with their general denial, and no trust was established as against them.

JUDGMENT AFFIRMED.

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 Smith v. Foxworthy.
 

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JOHN SMITH, APPELLEE, V. JEFFERSON H. FOXWORTHY,  
APPELLANT, ET AL.

FILED FEBRUARY 6, 1894. No. 5097.

1. *Vought v. Foxworthy*, 38 Neb., 790, reaffirmed.
2. **Judicial Sales: APPRAISEMENT: CONFIRMATION.** The provisions of the statute requiring a sheriff to deduct from the real value of the lands levied upon the amount of liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiffs, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisal. *Craig v. Stevenson*, 15 Neb., 362, followed.
3. **Notice of Judicial Sales: PUBLICATION.** The statute providing for notice of sales of land upon execution or foreclosure does not require that the newspaper in which such notice is published shall have a general circulation in any particular city or portion of the county.
4. **Order of Sale: NOTICE TO DEFENDANT.** It is neither fraudulent nor unfair for the plaintiff in a foreclosure case to proceed with all legal dispatch after the time of redemption has expired, nor is he required to give the defendant notice of the issuance of the order of sale.
5. **Excessive Costs: MOTION TO RETAX.** If excessive costs have been taxed in the proceedings incident to the sale, the remedy is by a motion to retax costs, and not by objection to the confirmation of the sale.

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

*J. H. Foxworthy*, appellant, *pro se*.

*Westermann, Low & Gould*, contra.

IRVINE, C.

This is an appeal by the defendant Foxworthy from an order confirming a sale of his real estate made under a de-

cree of foreclosure formerly entered in the cause. The grounds upon which confirmation was resisted will be treated in their order:

1. That the appraisement was too low. In *Vought v. Foxworthy*, 38 Neb., 790, it was held that on motion to vacate a sale the value fixed by the appraisers can only be assailed for fraud; that objections upon the ground that the appraised value is too high or too low should be filed with a motion to vacate the appraisement before the sale occurs, and that to justify the setting aside of a sale on the ground that the property was appraised too low the actual value must so greatly exceed the appraised value as to raise a presumption of fraud in the making of the appraisement. We are entirely satisfied with the conclusion reached in that case. There is no allegation here that the appraisers were guilty of fraud, and there is a great deal of evidence to confirm the valuation placed by them upon the property.

2. That there were no certificates of liens and incumbrances obtained, procured, or filed, and that such certificates had not been waived. In *Craig v. Stevenson*, 15 Neb., 362, it was held that the provisions for such certificates and the deduction in making the appraisement from the real value of the property of the amount of prior incumbrances were for the sole benefit of the plaintiff and might be waived by him. The rule laid down in that case is undoubtedly correct. The plaintiff did not object to the failure to procure certificates, but asked for confirmation notwithstanding that fact. This constituted a waiver upon his part. The defendant cannot complain. The "set up" price, if there were incumbrances, being increased by the failure to certify them, the defendant thereby received a benefit rather than suffered a disadvantage.

3. That there was no such notice of sale as is required by law. In support of this objection the defendant contends that the notice was not published in such a newspaper as the law requires. It appears that it was published

in the *Lincoln Weekly News*. The affidavit proving publication contains the averment that the paper was of general circulation in Lancaster county. There is another affidavit in the bill of exceptions that the paper has a circulation in Lancaster county of between nine hundred and one thousand copies per week. This is only met by proof in general terms by affidavit of defendant that the paper is not of general circulation in the city of Lincoln as he believes. Section 497 of the Code requires notice to be published "in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper in general circulation therein." It is not required that the newspaper shall have a general circulation in any particular city or portion of the county. The publication of this notice satisfied the requirements of the statutes, and if those requirements do not insure a proper publicity, the remedy lies with the legislature and not with the courts.

4. Fraud in the proceedings. The allegations in support of this objection are as follows:

(a.) That the proceedings were hurried through while the defendant was perfecting a loan with which to pay off the debt. Decrees always provide a reasonable period within which to redeem after decree, and in addition to that period the defendant in this state is entitled to an extended stay of execution without a bond. If he fails to redeem within the time thus given him he cannot complain because the plaintiff proceeds with all the dispatch the law permits.

(b.) No notice was served on the defendant of the issuance of the order of sale until within two days of the sale, and the defendant did not know of its issuance. The statute does not require that the defendant should be notified of the issuance of an order of sale. It is a matter of record of which he must take notice.

(c.) The third, fourth, and fifth allegations of fraud relate to the publication of the notice and the failure to procure certificates. These subjects have already been treated.

Robb v. Hewitt.

(d.) The costs of publication were \$6, when they should not have been over \$2.75. The remedy for this would be by motion to retax the costs, and not to set aside the sale.

There is no fraud alleged and the proof does not even support such allegations as were made.

The judgment of the district court was right and is

**AFFIRMED.**

H. M. ROBB V. CLARA HEWITT.

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FILED FEBRUARY 6, 1894. No. 5104.

1. **Bastardy: COMPLAINT.** The complaint in a bastardy proceeding, where it charges the date of the birth of the child, need not set out the time or place when or where it was begotten.
2. ———: **EVIDENCE.** An offer made by the defendant to the father of the prosecutrix to contribute money for the purpose of "sending the prosecutrix away" is not an offer to compromise, and is admissible in evidence.
3. ———: ———. In a bastardy proceeding only a preponderance of the evidence is necessary to a conviction, and a verdict may be sustained upon the uncorroborated testimony of the prosecutrix alone.
4. ———: ———. Certain evidence in rebuttal of evidence of good reputation examined, and its admission *held* not to be error.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J.

*John C. Watson*, for plaintiff in error.

*M. L. Hayward*, contra.

IRVINE, C.

The defendant in error charged plaintiff in error with bastardy, and upon trial he was found guilty.

1. The complaint, omitting the formal parts, is as follows: "That she is an unmarried woman, resident of Otoe county, in the state of Nebraska; that on the 16th day of October, 1889, she was delivered of a bastard female child, and that Hamilton Montgomery Robb is the father of said child." The defendant moved the court to require the prosecutrix to make the complaint more certain by averring the time and place where the child was begotten. This motion was overruled. The complaint is in a form which has in its support at least the sanction of custom, but its sufficiency has never been directly determined by this court. Were it not for the provisions of chapter 37, section 1, Compiled Statutes, requiring in such cases an examination under oath of the prosecutrix, before the justice of the peace to whom complaint is made, there would be much force in the argument that the defendant should be informed by the complaint of the time and place of the alleged intercourse. But the section cited provides for such an examination, permits the accused to cross-examine, and requires that the examination shall be reduced to writing and certified to the trial court, where it "shall be given in evidence." These provisions furnish the accused with all requisite information, and we do not think the complaint need be more specific than the statute in terms requires.

2. The father of the prosecutrix was permitted to testify that at some time, not very definitely fixed, but apparently not long before the birth of the child, he told the defendant of the girl's condition and asked him what he was going to do about it. Defendant denied the implied charge. In the course of the conversation the father remarked that if he had a little money he would send the girl away. Thereupon defendant asked the father to remain a short time, went away himself and soon returned, saying, "What do you mean,—that you would send her away if you had a little money?" The father answered, "I meant just what I said." Defendant said, "Do you mean if I would pay

half that you would pay half?" This testimony was objected to, and its admission is assigned as error, counsel invoking the rule which excludes, as privileged, offers to compromise. The rule referred to applies to this class of cases. (*Olson v. Peterson*, 33 Neb., 358.) It is a salutary rule and should be rigidly enforced; but this evidence did not fall within it. There was no offer to compromise, but merely a suggestion that defendant would share the expense of sending the girl away. The rule arises from the policy of the law which favors amicable settlements, but does not extend to offers made, which, if accepted, would merely baffle prosecutions or conceal evidence, without effecting a legal compromise.

3. The defendant introduced evidence of good reputation. Plaintiff in rebuttal undertook to meet this with evidence of bad reputation. Several errors are assigned in the admission of such evidence.

Mr. Ames testified that before this case arose he had never heard anything to defendant's discredit; that since this case arose he had "heard some bad talk that I didn't wish to hear. Q. Anything aside from this Hewitt girl? A. Why, yes, sir. In a manner the same." That prior to this trouble he had never heard anything, and that he presumed what he had heard arose from this trouble. He was not permitted to state what he heard. While the examination was somewhat irregular we cannot see how the defendant was prejudiced.

Mr. Brown was asked: "Have you heard anything of his reputation or that affected his reputation prior to this [the Hewitt case]? A. Yes, sir. Q. State what it was. A. Mr. Robb made a slighting remark about a very estimable young lady." The answer was not responsive to the question, and no motion was made to strike it out. The court refused to permit witness to state anything further. Here there was no error, as the court sustained objections to such testimony as soon as they were made.

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Free v. Stuart.

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Mr. Hargus, when asked the general question as to the reputation, said he "had heard some little bad talk about defendant." This testimony was fairly responsive to the inquiry as to the reputation, and was properly received.

4. The court was asked to charge the jury that a verdict of guilty could not be based on the uncorroborated testimony of the prosecutrix. The law is otherwise, and the court correctly refused to charge as requested. (*Olson v. Peterson, supra.*)

Another instruction requested was that proof beyond a reasonable doubt was required. This was correctly refused. A preponderance of the evidence is sufficient. (*Altschuler v. Algaza*, 16 Neb., 631; *Olson v. Peterson, supra.*)

There was a general instruction requested to find for the defendant. An examination of the evidence discloses sufficient to sustain the verdict of guilty, and the court did right in refusing that instruction.

The other instructions requested are open only to the objection of calling too specifically to the attention of the jury certain parts of the testimony, but the principles of law involved were all fairly given to the jury in the court's instructions.

We find no error in the record, and the judgment is

AFFIRMED.

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39	220
148	150

M. E. FREE, APPELLEE, V. STUART & SCHMENSKY, IM-  
PLEADED WITH G. W. SAUTTER ET AL., APPELLANTS.

FILED FEBRUARY 7, 1894. No. 5545.

1. **Landlord and Tenant: FIXTURES.** The right of a tenant to recover trade fixtures must ordinarily be exercised while in possession under his lease; and if he fails to do so it will be lost, unless by some agreement with the landlord the right of removal is preserved.

2. ———: ———: CHATTEL MORTGAGES. Where a tenant gives a chattel mortgage upon a building erected by him upon leased premises, the mortgagee cannot remove the building after the tenant's right of removal expired.

APPEAL from the district court of Douglas county.  
Heard below before HOPEWELL, J.

The facts are stated in the opinion.

*Charles Offutt*, for appellants:

The property in dispute constitutes a "fixture" in the proper legal sense of that term. The tenant has never possessed the right to remove it, nor the power to delegate that right. (*Teaff v. Hewitt*, 1 O. St., 511; *Freeman v. Lynch*, 8 Neb., 199; *Hutchins v. Masterson*, 46 Tex., 551; *Elwes v. Maw*, 3 East [Eng.], 38; *Buckland v. Butterfield*, 2 Brod. & Bing. [Eng.], 54; *Philipson v. Mullanphy*, 1 Mo., 620; *Long v. Kee*, 8 So. Rep. [La.], 610; *Merritt v. Judd*, 14 Cal., 60; *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 24 Pac. Rep. [Col.], 920; *Collamore v. Gillis*, 22 N. E. Rep. [Mass.], 46; *Harmon v. Kline*, 12 S. W. Rep. [Ark.], 496.)

Whatever right to remove the tenant may once have possessed could only have been exercised during his tenancy. (*Fitzherbert v. Shaw*, 1 H. Bl. [Eng.], 258; *Lyde v. Russell*, 1 B. & Ad. [Eng.], 394; *Lee v. Risdon*, 7 Taunt. [Eng.], 191; *Thomas v. Crout*, 5 Bush [Ky.], 37; *White v. Arndt*, 1 Whart. [Pa.], 91; *Pemberton v. King*, 2 Dev. [N. Car.], 376; *Gaffield v. Hapgood*, 17 Pick. [Mass.], 192; *Stockwell v. Marks*, 17 Me., 455; *Brooks v. Galster*, 51 Barb. [N. Y.], 196; *Beers v. St. John*, 16 Conn., 322; *Lawrence v. Kemp*, 1 Duer [N. Y.], 363; *Shepard v. Spaulding*, 4 Met. [Mass.], 416; *Preston v. Briggs*, 16 Vt., 124; *Haflick v. Stober*, 11 O. St., 482; *Moore v. Smith*, 24 Ill., 512; *Thropp's Appeal*, 70 Pa. St., 396; *Dingley v. Buffum*, 57 Me., 381; *Whipley v. Dewey*, 8 Cal., 36; *Pugh v. Arton*,

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8 L. R. Eq. [Eng.], 626 ; *Davis v. Eytton*, 7 Bing. [Eng.], 154; *Wceton v. Woodcock*, 7 M. & W. [Eng.], 14; *Minshall v. Lloyd*, 2 M. & W. [Eng.], 450; *Mackintosh v. Trotter*, 3 M. & W. [Eng.], 184; *Josslyn v. McCabe*, 1 N. W. Rep. [Wis.], 134; *Erickson v. Jones*, 35 N. W. Rep. [Minn.], 267; *Carlin v. Ritter*, 13 Atl. Rep. [Md.], 370; *Loughran v. Ross*, 45 N. Y., 792.)

The tenant has no right to remove the buildings and his mortgagee cannot do so. (*Friedlander v. Ryder*, 30 Neb., 783; *Smith v. Park*, 31 Minn., 70; *Talbot v. Whipple*, 14 Allen [Mass.], 177; *Fitzgerald v. Anderson*, 51 N. W. Rep. [Wis.], 554.)

*Cavanagh, Thomas & McGilton, contra:*

The building was designed for the purpose of trade and can be removed without permanent injury to the realty. The mortgagee of the tenant had, therefore, a perfect and clear right to remove the property covered by the mortgage. (*Cupen v. Peckham*, 35 Conn., 95; *Lamphere v. Lowe*, 3 Neb., 136; *Van Ness v. Pacard*, 2 Pet. [U. S.], 143; *Lawton v. Lawton*, 3 Atk. [Eng.], 13; *Penton v. Robart*, 2 East [Eng.], 88; *Poole's Case*, 1 Salk. [Eng.], 368; *Whiting v. Brastow*, 4 Pick. [Mass.], 310; *Smith v. Benson*, 1 Hill [N. Y.], 176; *Ombony v. Jones*, 19 N. Y., 239.)

Where a tenant by the year holds over his term he becomes a tenant for another year. (*Critchfield v. Remaley*, 21 Neb., 178; *Crommelin v. Thiess*, 70 Am. Dec. [Ala.], 501.)

NORVAL, C. J.

This action was brought in the court below by appellee M. E. Free to foreclose a chattel mortgage given by the defendants Stuart & Schmensky on two greenhouses erected by them on leased real estate owned by appellants George W. Sautter and Frank Sautter. The cause was

tried by the district court upon a written agreed statement of facts, signed by the attorneys of the respective parties, of which the following is a copy :

“1. In the spring of 1888 the said George W. and Frank Sautter were the owners in fee of a certain dwelling house, with outbuildings and about ten acres of land surrounding, in the outskirts of the city of Omaha, and within the limits of said city. That at said time said Sautter brothers rented the house and outbuildings only from April 1, 1888, to March 1, 1889, to the defendant C. Schmensky for \$100. The rent for this term was paid.

“2. At the end of this term said George W. and Frank Sautter rented the house, barn, orchard, vineyard, and all the land for one year for \$200, the lease expiring March 1, 1890, and of this rent the tenant Schmensky paid \$93, leaving a balance still unpaid of \$107.

“3. At the end of this term, on March 3, 1890, said George W. and Frank Sautter rented the same premises for another year to said Schmensky for \$225, the lease expiring March 1, 1891. Of this rent there was paid \$13.40.

“4. At the end of the last term the tenant, Schmensky, held over until May 12, 1891, at which time the tenant quit the possession and occupation of the premises, leaving a total of rent unpaid amounting to the sum of \$341.60, no part of which has yet been paid.

“5. That in the spring of 1890, said Schmensky requested permission of said George W. and Frank Sautter, owners of said premises, to erect thereon two buildings and a boiler house, and that the same were erected during the spring and early summer of 1890. They were erected by building the same out of planks and posts, with the use of glass and sash, as is usually the case in greenhouses, the said boards or planks being fastened to a number of upright posts that were inserted and fastened into the ground for a distance of about two feet below the surface. The framework was built around said posts.

"6. That there was also constructed in said greenhouses a boiler for the purpose of heating the same, by building a brick foundation down into the ground, and building said brick up over and around said boiler, leaving it stationary, and pipes were attached to and ran from said boiler through the various portions of the house so constructed, and fastened to the said greenhouse in order thereby to conduct the heated water and for the purpose of keeping the temperature in a condition required for greenhouses. The two buildings used as greenhouses were each seventy-five feet long and ten feet wide, and were covered with glass and sash. They were constructed by nailing strips running from post to post, and onto those strips the planks for the sides and ends were nailed securely, and said houses and boiler are still remaining on said premises as when originally constructed.

"7. On January 14, 1891, said Schmensky and one Stuart, who were partners as Stuart & Schmensky, executed to plaintiff a chattel mortgage, a true copy of which is attached and made a part of plaintiff's petition herein, and the same was filed in the office of the county clerk of Douglas county, Nebraska, on said 14th day of January, 1891, at the hour of 3:45 P. M., and duly indexed in said office as required by law in case of chattel mortgages, said chattel mortgage being to secure the amount of money stated therein, and the amount now due thereon and unpaid by said mortgagors to the plaintiff is \$182.40.

"8. Said property was leased for the purpose of using the residence as a dwelling house, and the land for the purpose of gardening, raising flowers and shrubs, it having been used for this purpose for several years last past. At the time said houses were constructed there was nothing said by the tenant about removing said greenhouses, boiler, and boiler house at the expiration of the lease, or at any other time.

"9. The plaintiff claims a lien on said houses and boiler

by virtue of the foregoing chattel mortgage, and the defendants George W. and Frank Sautter claim them as fixtures to, and a part of, said land."

The trial court found that Stuart & Schmensky executed and delivered to plaintiff the chattel mortgage, described in the petition, to secure an indebtedness of \$163.84; that the buildings described in said mortgage were erected by the mortgagors upon leased premises and were such fixtures as the tenants had a right to remove; and that said houses are subject to the said chattel mortgage. From a decree of foreclosure and sale, the Sautters appeal to this court.

The point in dispute is, which party is entitled to the buildings covered by the mortgage? The mortgagee claims them by virtue of his mortgage, while the appellants insist that, as the improvements were erected by tenants on leased premises, they are a part of the realty, and neither the tenants nor the mortgagee had a right to remove them, at least, after the expiration of the tenancy.

The larger portion of the brief of counsel on either side is devoted to the discussion of the law of fixtures, and what are, and what are not, movable fixtures. The decisions on the subject are at variance and irreconcilable. We have not the time at our disposal now to review the authorities cited in the briefs, or to discuss the question; nor is it essential that we should do so. For the purposes of this case we will assume that the buildings in controversy were trade fixtures, and were erected under such circumstances as to entitle the tenants to remove them, had they exercised that right in time. The authorities are quite uniform to the effect that, in the absence of an agreement or understanding to the contrary, a tenant cannot re-enter and remove his fixtures and improvements after the expiration of his tenancy. By surrendering possession he forfeits his rights to them. The rule on the subject is well stated by Mr. Taylor in his valuable work on Landlord and Tenant thus: "The decisions also agree, that whatever fixtures the ten-

ant has a right to remove must be removed before his term expires, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty vests immediately in the landlord; and although the landlord has no right to complain if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture of notice to quit, he has a right to consider them as part of his property." (Taylor, Landlord and Tenant [8th ed.], sec. 551.) And in the case of *Friedlander v. Ryder*, 30 Neb., 787, in considering the authority of a tenant to remove his fixtures, we said: "Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him which are embraced under the head of tenant's fixtures, but the tenant had no authority to remove such improvements after the termination of the tenancy; in other words, the tenant could not re-enter to remove his fixtures after the surrender of possession to the landlord."

It appears from the stipulation that the lease, under which the tenants occupied the premises, expired on March 1, 1891, and that on the 12th day of May following they quit possession without removing the buildings which they had erected by permission of the owner of the realty. The record fails to disclose that there was any agreement or understanding between the parties about the removal of the improvements at the expiration of the lease, or any other time. In view of these facts there could be no doubt that the tenants have forfeited their right of removal.

Counsel for appellee contend that the tenancy had not expired when the tenants surrendered possession; that they were tenants from year to year, and, although the lease terminated March 1, 1891, they having occupied the premises for several months after that time, the lease was thereby continued in force for another year, or until March, 1892. It is a familiar doctrine that where, in case of a tenancy from year to year, the tenant continues to occupy the property after the expiration of his lease by the consent of the landlord, it will be presumed, in the absence of an express agreement to the contrary, that the lease is extended for another year; but we are unable to see how this rule can aid the appellee, since the tenants voluntarily abandoned possession; and it does not appear that either they or the landlord, after such abandonment, regarded the lease in force. The doctrine that the right of a tenant to remove his improvements must be exercised before the expiration of his lease, applies alike to cases where the tenancy terminates by lapse of time, and to cases where it is determined by his own act. He may forfeit his right to remove his fixtures by voluntarily surrendering the possession to the landlord without reservation. It is quite probable, however, that such surrender would not affect the previously acquired rights of the tenant's vendees or mortgagees. They should have the right to enter and remove the fixtures at any time before the lease would, by its terms, have expired. In the case at bar no attempt has been made to remove the buildings at any time. They were on the premises when the decree of foreclosure was entered, which was long after March 1, 1892, and it is not claimed that the tenancy continued after that date. Upon principle, as well as authority, we are constrained to hold that the mortgagees forfeited their right to the buildings by their failure to exercise it during the tenancy.

It is finally contended that since the tenancy had not expired when the mortgage was given, and inasmuch as the

tenants could have removed the mortgaged fixtures, the appellee's rights vested and became fixed, and were not affected by the subsequent termination of the lease. The mortgage conferred the same rights upon the mortgagee to remove the fixtures that the mortgagors had, and no greater. Appellee was therefore required to exercise the privilege of removal during the tenancy. In principle the case at bar is not distinguishable from *Friedlander v. Ryder, supra*. In that case a creditor caused an execution to be levied upon a tenant's fixtures. It was held that the creditor thereby acquired no greater right to re-enter and remove them than the tenant had. A case precisely in point is *Smith v. Park*, 31 Minn., 70. There a tenant during his term had executed a chattel mortgage upon a frame building upon leased premises. The landlord claimed the building and the mortgagee brought replevin after the lease expired. The court held that the mortgagee's right to remove the building was lost. The court in the opinion say: "The plaintiff stands in no better position than did Burgess [the tenant]. His right to the property, as against the landlord, is only such as the tenant under whom he claimed had. It was for him to see to it that the building was removed within the time which, by the law and terms of the contract, was given to the tenant for such a purpose."

Our conclusion is that the trial court erred in decreeing the foreclosure of the mortgage. The decree is, therefore, reversed and the action

DISMISSED.

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58-109

STILLMAN S. FLAGG, APPELLANT, V. EVERETT S. FLAGG  
ET AL., APPELLEES.

FILED FEBRUARY 7, 1894. No. 5508.

1. **Supplemental Answer: NOTICE.** A district court, on motion, may permit a defendant to file a supplemental answer, setting up facts material to his defense which have occurred subsequent to the filing of the original answer. Notice of the motion should be served on the adverse party; but the failure to give notice is not reversible error, where the application is presented in open court in the presence of the other party or his attorney of record, and the order is granted without any objection being urged that notice was not served.
2. **Judgment: EXPIRATION OF LIEN: EFFECT OF EXECUTION.** A judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor in five years from the date thereof, unless an execution is sued out on such judgment within said period. In case an execution is issued and returned in such time, it will continue the lien of the judgment for five years from the date of such execution.
3. ———: ———. The commencement of an action by a judgment creditor within five years from the date of his judgment to subject real estate of the defendant to the payment of the judgment, and the pendency of such action after such period, will not have the effect to prevent the judgment from becoming dormant or operate to prolong the lien of the judgment.
4. **Dormant Judgments: LIENS.** When a judgment becomes dormant, its lien is lost as against a mortgage executed by the judgment debtor and recorded during the continuance of the judgment lien.

APPEAL from the district court of Douglas county.  
Heard below before IRVINE, J.

*Howard B. Smith*, for appellant.

*Bradley & De Lamatre* and *F. A. Brogan*, contra.

NORVAL, C. J.

The facts in the case, so far as necessary to be stated for a proper understanding of the questions presented for de-

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Flagg v. Flagg.

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cision, are as follows: On the 10th day of September, 1885, the defendants Everett S. Flagg and Ada E. Flagg executed and delivered to plaintiff a mortgage on certain real estate situate in the county of Douglas, to secure the payment of two promissory notes of said Everett S. Flagg for \$900 and \$1,100, respectively, bearing six per cent interest from date, which mortgage was duly recorded on September 11, 1885. On September 26, 1885, Horst & Riddell recovered a judgment against E. S. Flagg, before a justice of the peace of Douglas county, for the sum of \$133.31 debt, and costs of suit, a transcript of which judgment was filed in the district court of said county on October 13, 1885. On the 17th day of November, 1885, W. J. Welschans & Co. obtained a judgment in the county court against Everett S. Flagg for \$215.46 and costs, and on the next day a transcript of said judgment was filed in the district court of said Douglas county. On November 16, 1885, H. Westerman & Co. recovered a judgment in the county court against E. S. Flagg in the sum of \$109.36 and costs, and three days later a transcript of said judgment was filed in the office of the clerk of the district court of Douglas county. On December 12, 1885, D. M. Steele & Co. recovered a judgment in the district court of Douglas county against Everett S. Flagg for the sum of \$441.46 and costs; and on the 13th day of December, 1885, Ernest Peycke *et al.* recovered a judgment in the same court against said Flagg for \$355.05 and costs. All of said judgments have been duly assigned to the plaintiff and appellant. No execution has been issued on either of said judgments, nor have the judgments been revived. On the 18th day of April, 1888, the defendants Everett S. Flagg and Ada E. Flagg executed and delivered to the defendant C. W. Conkling a mortgage upon the real estate described in plaintiff's mortgage, to secure the payment of three promissory notes executed by said Everett S. Flagg, aggregating \$3,350, all drawing interest at the rate of ten per cent per annum from

date, which mortgage deed was duly filed and recorded the next day. On the 8th day of February, 1890, plaintiff brought this action in the court below, setting up in his petition his mortgage and the aforesaid described judgments, praying a foreclosure of the mortgage, and that the proceeds arising from the sale of the premises, after the payment of the costs of suit, be applied in payment of the amount found due upon the mortgage, and the surplus, if any, in satisfaction of the judgments. On the 22d day of March, 1890, the appellee Conkling filed an answer and cross-petition, setting up his mortgage and praying a foreclosure thereof, and that the lien of his mortgage be decreed to be junior only to the lien created by plaintiff's mortgage. On the 26th day of May, 1891, by leave of court, Conkling filed a supplemental answer, alleging therein that since the filing of his original answer no execution had been issued on either of the judgments set out in plaintiff's petition, and that said judgments were barred and did not constitute a lien upon the lands in controversy, with prayer that Conkling's mortgage be decreed a lien paramount to that of said judgments. Upon the trial in the court below a decree of foreclosure of both mortgages was rendered, establishing plaintiff's mortgage as a first lien, Conkling's mortgage a second lien, and the judgments a third lien. From this decree plaintiff appeals, claiming that the judgments are liens superior to the lien of the mortgage of appellee Conkling.

The first question submitted for our consideration is, did the trial court err in permitting defendant Conkling to file a supplemental answer? Section 149 of the Code of Civil Procedure provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." It is not denied that under the foregoing provision a district court has the power to

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permit either party to a cause to file a supplemental pleading, inserting therein material matters which have arisen subsequent to the filing of the original pleading; but it is insisted by counsel for the plaintiff that notice of an application for leave to file such a pleading is a condition precedent; and further, that it was an abuse of discretion in the court allowing a supplemental answer to be filed in this case. The statute seems to contemplate that notice of the filing of a supplemental pleading shall be given. Undoubtedly such is the better practice. In the case under consideration it does not appear whether or not any notice of the application was served upon the plaintiff, but the record does disclose that plaintiff was present in court when the order complained of was made, and that he excepted to the order. It not appearing that any objection was at the time urged on the ground that no notice of the motion for leave of the court to file had been served, we must regard that written notice, if not given, was waived. Plaintiff had actual knowledge of the object of the motion and appeared and resisted the granting thereof. He could not have done more had written notice been served. There was no abuse of discretion in granting the order in question. The matter set up in the supplemental pleading occurred after the original answer was filed, and was material to be considered in determining the case. When the first answer was filed the judgments described in plaintiff's petition were not barred, but having since become dormant it was entirely proper to bring the same to the attention of the court by supplemental pleading. Defendant was not guilty of laches in not filing his supplemental pleading sooner, since the statute of limitations did not run against the last judgment until in December, 1890, and the supplemental answer was filed in May following, or nearly a year before the cause was tried in the court below.

The remaining question in the case is whether appellees' mortgage is a second lien upon the premises and superior

to plaintiff's judgments? At the time the action was brought the judgments described in the petition were valid and subsisting liens upon the real estate in controversy, superior to the lien of the Conkling mortgage, and retained their priority unless the liens of the judgments were lost by reason of the judgments becoming dormant during the pendency of the action. Section 482 of the Code provides: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out the writ of execution, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor." In construing a statute where the meaning is not clear, the rule is to give it such interpretation as will comport with what is supposed to have been the purpose or intention of the legislature; in other words, where the intention is manifest, it will control, rather than the language employed by the law-givers. In the section quoted, however, there is no ambiguity; no words employed which operate to defeat the clear and manifest intention of the enacting power. In fact, there is no room for construction. We must, therefore, apply the section according to its literal meaning. It is obvious that in case a judgment creditor fails for more than five years after the date of his judgment to sue out an execution, the judgment becomes dormant and ceases to be a lien upon the real estate of the defendant. We see no escaping the conclusion that where a judgment becomes dormant its lien is thereby lost as against a mortgage made by the debtor during the life of the judgment. (Black, Judgments, sec. 458; *Pennsylvania Agricultural & Manufacturing Bank v. Crevor*, 2 Rawle [Pa.], 224; *Ruth's Appeal*, 54 Pa. St., 173; *Duffy v. Houtz*, 105 Pa. St., 96; *Titman v. Rhyne*, 89 N. Car., 64; *McCarty v. Ball*, 82 Va., 872; *Hulsey v. Van Vliet*, 27

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Kan., 474; *Newell v. Dart*, 28 Minn., 248; *Bish v. Burns*, 7 Ohio Cir. Ct. Rep., 285; *Miner v. Wallace*, 10 O., 403; *Tracy v. Tracy*, 5 McLean [U. S.], 456.)

*Tracy v. Tracy* was where a judgment debtor executed a mortgage on certain real estate during the continuance of the lien of the judgment. Subsequently the judgment became dormant, which was revived after the mortgage was given. It was held that the revival of the judgment did not affect prior liens, and that the mortgage lien was superior to that of the judgment.

In *Miner v. Wallace*, *supra*, the court in the syllabus say: "Where real estate is subject to two liens, the elder a judgment and the younger a mortgage, if the judgment lies dormant five years its priority is lost and the mortgage takes the estate."

Counsel for plaintiff does not question that ordinarily a judgment, after the expiration of five years, ceases to be a lien upon the lands of the defendant, unless execution has been issued thereon within that period; but he insists that the rule does not apply here, inasmuch as plaintiff's judgments became dormant during the pendency of this action, and *Dempsey v. Bush*, 18 O. St., 376, is relied on as sustaining the contention. An examination of the decision will disclose that it does not cover the question here presented. The report of the case shows that Salmon W. Bush was the owner of eighty-eight acres of land in Ross county. In November, 1859, the executors of Will Ross obtained a judgment against Bush in the court of common pleas of Ross county for \$3,421.49, which became a lien upon said real estate. On February 5, 1861, an execution was sued out on said judgment and levied on said land, and then returned without sale. In April, 1860, Bush executed to Richard Dempsey a mortgage upon the said real estate to secure the payment of \$4,000, all the parties to the judgment agreeing that the mortgage should stand as a lien prior to the judgment. Subsequently, on February

18, 1861, Bush executed to James Dean and Aaron Stookey a further mortgage on the eighty-eight acres, which was duly recorded. On September 20, 1865, Dempsey brought suit to foreclose his mortgage and to ascertain and marshal the liens upon the mortgaged premises, all subsequent lienholders being made defendants. The equitable owners of the judgment filed an answer and cross-petition in the action, admitting the priority of Dempsey's mortgage and setting up the Ross judgment. On November 22, 1865, a decree was entered, finding the amount due on plaintiff's mortgage, and the land was ordered sold by the sheriff. Out of the proceeds of the sale his mortgage was to be first paid and the residue of the proceeds to be brought into court to be distributed among the subsequent lienholders, according to priority. An order of sale was issued in January, 1866, and the land sold by the sheriff on February 24, 1866. Dempsey's claim was paid off and the residue of the proceeds was brought into court for distribution among the other lienors. After the order of sale was issued, but before the sale, James Dean, by counsel, filed an answer setting up his mortgage and alleging that the Ross judgment had become dormant, no execution having been issued thereon since February 5, 1861, and no revivor having been had. The supreme court of Ohio held that the owners of the judgment did not lose their right to share in the distribution of the money arising from the sale of the land by reason of the judgment becoming dormant during the pendency of the suit. It will be noticed that the judgment did not become dormant in the case alluded to until after the decree was rendered and the order of sale had been issued. In this important particular that case differs from the one at bar. Here the judgment became dormant long before the decree of foreclosure was rendered. The decree in the Ohio case fixed the status of the parties, and it was quite immaterial that the judgment afterwards became dormant. The fact that the judg-

ment ceased to be a lien after the decree was rendered could not affect the right of the judgment creditor to participate in the distribution of the proceeds of the sale made in pursuance of that decree. The property was ordered sold for the purpose of paying the judgment and other liens on the land.

Day, J., in speaking of the case of *Dempsey v. Bush*, in his opinion in *Bish v. Burns*, 7 Ohio Cir. Ct. Rep., 289, says: "We think the fair inference to be drawn from the case is that the supreme court is of the opinion that the pendency of the action and the actual disposing of the property, by sale, on the court's order, preserved the judgment from dormancy, and maintained its lien and right to be paid from the proceeds of the sale of the property so appropriated for that purpose."

Judgments are liens only by force of statute. A judgment of the district court in this state is a lien upon the real estate of the debtor within the county, from the first day of the term of court at which it was entered; and such lien remains in force for five years from the date of the judgment. In order to continue the lien beyond this period the statute, in express terms, requires that an execution must be issued within the life of the judgment. The issuance of an execution within five years prolongs the judgment and preserves the lien of the judgment for five years longer. The bringing of this action was not equivalent to, nor did it take the place of, the issuing of executions upon the judgments. The pendency of this suit did not prevent plaintiff from suing out executions. (See *Bish v. Burns*, *supra*.)

*Newell v. Dart*, 28 Minn., 248, is analogous to the case at bar. That was an action in the nature of a creditor's bill to subject property of the judgment debtor to the payment of a judgment recovered against him. By the statute of Minnesota, a judgment recovered in that state survives, and the lien thereof continues, for the period of ten years, and

no longer. There the action was brought within that period; but before a decree was rendered therein, plaintiff's judgment, which by the suit he was seeking to enforce, became dormant. It was contended in that case, as here, that the pendency of the action had the effect to keep alive the judgment. The court held that the commencement of the suit before the judgment was barred, and the pendency thereof afterwards did not operate to continue the judgment in force beyond the statutory period.

It is argued that the action may be treated as one to recover on the various judgments held by plaintiff, and as they were in full force when this suit was commenced, the statute of limitations ceased to run at the date of the summons which was served on the defendants. In no proper sense can this be regarded as a suit at law to recover a judgment upon plaintiff's judgments. It is merely an equitable action brought to foreclose a mortgage, and for the marshaling of liens upon the mortgaged premises. But if we regard this as an action at law upon domestic judgments, plaintiff would stand in no better position. The commencement of the action would prevent the running of the statute of limitations against the causes of action,—the judgments,—but it would not preserve the liens of the judgments after they became dormant. Had a new judgment been obtained by plaintiff, such judgment would have been a lien only from the first day of the term of court, which would have been subsequent to the recording of Conkling's mortgage; hence, the mortgage would have been the prior lien. Our conclusion is that plaintiff's judgment became barred and ceased to be a lien as against Conkling's mortgage, notwithstanding the pendency of this action. The decree of the court below is

**AFFIRMED.**

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39	238
43	230
43	245
39	238
45	125
45	232
45	797

**HARLAN P. SHERWIN, APPELLEE, V. LEMUEL L. GAGHAGEN ET AL., APPELLANTS.**

**FILED FEBRUARY 7, 1894. No. 4753.**

1. **Courts of Equity: JURISDICTION.** As a general rule a court of equity will not interpose an objection to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause for trial and award the relief to which the parties would have been entitled in a court of law.
2. ———: **OBJECTION TO JURISDICTION: REMEDY AT LAW: REVIEW.** Objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be made before judgment on the merits of the cause, and will not be entertained when made for the first time in this court on the appeal of the objecting party.
3. **Fraudulent Conveyances: CHATTEL MORTGAGES: POSSESSION BY MORTGAGOR.** A provision in a chattel mortgage for possession and power of sale by the mortgagor raises a conclusive presumption of fraud, and such conveyance will be held void as to creditors.
4. ———: **QUESTION OF FACT.** But in every case where the conveyance is not fraudulent on its face, the question of fraud is one of fact.
5. ———: ———: **RIGHTS OF CREDITORS.** Fraud in a chattel mortgage, by reason of a stipulation for possession and power of sale by the mortgagor, is available only to creditors whose executions or attachments are levied before delivery to the mortgagee under the terms of the mortgage.
6. ———: **EXCESSIVE SECURITY.** A mortgage of personal property for a part of the purchase price thereof will not be declared void as to creditors of the mortgagor on the ground that the value of the property mortgaged is largely in excess of the amount of the debt secured.

**APPEAL** from the district court of Lancaster county.  
 Heard below before **CHAPMAN, J.**

*John D. Pope and Pound & Burr, for appellants.*

*Robert Ryan, contra.*

Post, J.

This is an appeal from a decree of the district court of Lancaster county. In the petition it is charged in substance that on the 1st day of August, 1890, the appellant Gaghagen executed in favor of Sherwin, the appellee, three promissory notes, to-wit: One for \$150, due September 1, 1890; one for \$200, due October 1, 1890; and one for \$1,225.36, due November 1, 1890; all bearing interest at eight per cent. per annum. In order to secure the notes above described Gaghagen at the same time executed in favor of Sherwin a mortgage upon a stock of drugs and fixtures in the city of Lincoln, including counters, show cases, soda fountain, etc. Immediately following the description of the property mortgaged is this recital: "The intention being to convey to said H. P. Sherwin all the drugs and fixtures heretofore sold by said Sherwin to said Gaghagen, and this mortgage is given to secure a part of the purchase money for the said drugs, fixtures, and toilet articles, said fixtures being in 1124 O street, on east side of building, in Lincoln, Nebraska. The above described chattels are now in my possession, are owned by me, and free from incumbrance in all respects, but said possession immediately is transferred to H. P. Sherwin, and all the money realized from the sale of goods to apply on said notes as same become due, by J. H. Pinkerton, agent for H. P. Sherwin." Said mortgage was filed in the office of the county clerk of Lancaster county, September 22. On the 23d day of September, the note for \$150 remaining wholly unpaid, Sherwin demanded possession of the mortgaged property, whereupon it was all surrendered by Gaghagen to him to be sold in accordance with the conditions of the mortgage; but upon the representation of Gaghagen that he would in the meantime procure the means to discharge the several notes, Sherwin agreed that he would not advertise the mortgaged property for sale until September

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26. That the representation aforesaid was willfully false, and Gaghagen, instead of trying to secure money with which to pay said notes within the time agreed upon for that purpose, conspired with his co-defendant, Ferguson, to cheat and defraud the plaintiff out of his claim; that in pursuance of such conspiracy said parties procured to be assigned to Ferguson certain claims against Gaghagen, amounting in the aggregate to \$1,365.75, most of which were not due and many of which were purchased for fifty per cent of the face thereof; that on the 25th day of September Gaghagen voluntarily appeared before the district court and confessed judgment in favor of Ferguson for the amount of said claims; that an execution was immediately procured and placed in the hands of a deputy sheriff for service, and who within an hour thereafter, under the direction of Ferguson and Gaghagen, levied upon the property in controversy; and the defendant McClay, as sheriff, has advertised said property for sale to satisfy the judgment aforesaid; that the assignment of said claims, as well as the confession of the said judgment, was fraudulent, and designed by the defendants named to defraud the plaintiff, and that McClay, as sheriff, is using his office in order to assist the other defendants in their efforts to deprive the plaintiff of his security. The prayer is for a decree enjoining the several defendants from selling the property to satisfy the execution against Gaghagen and from otherwise interfering with his possession or the foreclosure of the plaintiff's mortgage.

The defendants joined in an answer, in which they admit the execution of the notes and mortgage by Gaghagen, the confession of judgment, the issuing of the execution and levy upon the mortgaged property as alleged, and deny the other allegations of the petition. The answer contains a charge of fraud in the following language: "Said notes were fraudulently obtained from said Gaghagen by said plaintiff through a trade made between said parties, by

which said plaintiff, by misrepresentation and misstatements, and by cheating and defrauding said Gaghagen, obtained said notes set out in said petition, as well as the chattel mortgage made to secure said notes. Defendants further answering say that the chattel mortgage set out in plaintiff's petition was fraudulent as to defendant E. I. Ferguson, who is a judgment creditor of said Lemuel L. Gaghagen; that said chattel mortgage was given to the said plaintiff by the said Lemuel L. Gaghagen, by which the said Gaghagen obtained possession of said stock of goods covered by said chattel mortgage, and allowed the said Gaghagen to retain possession of said goods and chattels and to buy and sell in his own name up to the time the said sheriff of Lancaster county by his deputy levied an execution upon the same under a valid and subsisting judgment, said judgment and execution being mentioned in the petition filed herein." It is further alleged that Gaghagen was at the time of the levy in possession of the mortgaged property, also that the plaintiff has an adequate remedy at law.

The reply is a general denial of the affirmative allegations of the answer.

The cause was sent to a referee with instructions to find the facts, and who accordingly, at the next term of court, submitted the following findings:

"1. I find that on the 16th day of July, 1890, the plaintiff Harlan P. Sherwin was the owner of a certain stock of drugs and fixtures situated in the east half of the room No. 1124 O street, in the city of Lincoln, Nebraska, and that the defendant Lemuel L. Gaghagen was the owner of a farm with certain stock, crops, and farming implements near the town of Friend, in Saline county, Nebraska.

"2. I find that on said 16th day of July, 1890, the said Harlan P. Sherwin and Lemuel L. Gaghagen made and entered into an agreement in writing whereby they agreed

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to make an exchange of their respective property as described in the first finding.

"3. I find that said agreement was duly executed and said exchange consummated on or about the 1st day of August, 1890, and each party duly entered into possession of the property so acquired by him.

"4. I find that the said stock of drugs and fixtures was found to exceed in value the said property of L. L. Gaghagen in the sum of \$1,570.36.

"5. I find that to secure the payment of said difference in value the said Lemuel L. Gaghagen made, executed, and delivered to said H. P. Sherwin three promissory notes, as follows: One for \$150, due September 1, 1890; one for \$200, due October 1, 1890; and one for \$1,220.36, due November 1, 1890, with eight per cent interest; and to further secure the said promissory notes, said L. L. Gaghagen made, executed, and delivered to the said Harlan P. Sherwin a chattel mortgage upon the said stock of drugs and fixtures so purchased by him of said Harlan P. Sherwin.

"6. I find that said chattel mortgage was duly filed for record in the office of the county clerk of Lancaster county, Nebraska, on the 22d day of September 1890, at 4 o'clock P. M., and has ever since remained of record in said office.

"7. I find that said trade or exchange between said Harlan P. Sherwin and said Lemuel L. Gaghagen was open and fair and without fraud on the part of either party thereto, and that said notes and chattel mortgage were *bona fide*, and for a valuable consideration, and without any intention to defraud creditors or purchasers, and that no portion of the consideration for the same has failed.

"8. I find that possession of said stock of drugs and fixtures was taken by L. L. Gaghagen on or about August 1, 1890, and continued by him until the evening of September 22, 1890, and that up to said time the business was conducted and carried on in the name of said L. L. Gaghagen.

"9. I find that on the 24th day of September, 1890, the

said L. L. Gaghagen was indebted to the following persons in Saline county, Nebraska: Mrs. McDougall, note dated April 30, 1889, due July 30, 1890, for \$22.10, ten per cent; T. E. B. Mason, note dated October 23, 1889, due October 23, 1890, \$125, ten per cent; J. A. Copperthwaite, note dated November 4, 1889, due November 4, 1890, \$210, ten per cent; Merchants & Farmers Bank, note dated May 24, 1889, due August 26, 1890, \$99.25, ten per cent; W. C. Thompson, note dated February 6, 1890, due February 6, 1891, \$43.00, ten per cent; Bissell & Schmidt, note dated August 9, 1890, due November 9, 1890, \$61.32, ten per cent; A. E. Moeller, note dated August 7, 1890, due September 7, 1890, \$314.30, ten per cent; J. D. Pope, note dated September 18, 1890, due one day after date, \$200, ten per cent; First National Bank, Dorchester, Nebraska, note dated August 6, 1890, due November 6, 1890, \$100, ten per cent; W. R. Williams, note dated February 13, 1890, due February 13, 1891, \$83, ten per cent; Holland & Co., account, \$21.85; Friend Grocery Company, account, \$20.50; H. K. & H. A. Johnson, account, \$20.27; making a total of \$1,320.69, exclusive of interest.

"10. I find that on the 25th day of September, 1890, at about 11 o'clock A. M., the defendant Ephraim I. Ferguson filed his petition in the district court of Lancaster county, Nebraska, against the defendant Lemuel L. Gaghagen, wherein he claimed to be the owner of the notes and accounts described in the ninth finding of fact, and prayed judgment thereon against the said L. L. Gaghagen.

"11. I find that on said 25th day of September, 1890, at about 11 o'clock A. M., and at the time the said petition against him was filed, the said Lemuel L. Gaghagen duly confessed judgment in said district court in favor of said Ephraim I. Ferguson for the sum of \$1,365.75.

"12. I find that there were present in the court room when said judgment was confessed, the said Ephraim I.

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Ferguson and Lemuel L. Gagghagen, also J. D. Pope and L. W. Billingsley, attorneys in said cause.

"13. I find that said judgment was so confessed by said L. L. Gagghagen for the purpose of placing the creditors, whose claims were included in said judgment, upon an equal footing in respect to securing payment of their said claims, and that said judgment was so confessed under an agreement with J. D. Pope that all of said claims were to be gathered together and included in one judgment; and I further find that such agreement or arrangement was made on the 24th day of September, 1890.

"14. I find that the account of Holland & Co. was transferred to E. I. Ferguson on the evening of September 24, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that payment was made by Ferguson to Holland & Co. some time subsequent to the 25th day of September, 1890.

"15. I find that the account of the Friend Grocery Company was transferred to E. I. Ferguson on the evening of September 24, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that payment was made by Ferguson to J. J. Holland, agent of the Friend Grocery Company, some time subsequent to the 25th day of September, 1890.

"16. I find that the account of H. K. & H. A. Johnson was transferred to Ferguson on or about the 24th day of September, 1890, under an agreement whereby Ferguson was to pay fifty cents on the dollar therefor, and that Ferguson paid \$10 therefor at some time subsequent to September 25, 1890.

"17. I find that the note of W. C. Thompson was transferred to Ferguson on the evening of September 24, 1890, and that Ferguson paid \$30 therefor at the time of its delivery.

"18. I find that the note of Bissell & Schmidt was transferred to Ferguson on the evening of September 24, 1890,

and that subsequent to September 25, 1890, Ferguson paid fifty cents on the dollar therefor.

"19. That as to the other claims described in said petition, no evidence was offered by either party, and I am unable to state when the same were transferred to Ferguson, if at all, or the price paid or the time of payment therefor.

"20. I find that immediately upon the entering of said confession of judgment by said L. L. Gagghagen, an execution was ordered issued thereon, and I find that L. W. Billingsley, attorney for L. L. Gagghagen, in company with J. D. Pope, attorney for E. I. Ferguson in said cause, immediately after said execution was ordered issued, proceeded to the office of the sheriff of Lancaster county, Nebraska, and that there L. W. Billingsley, in the presence and hearing of said J. D. Pope, gave Deputy Sheriff H. V. Hoagland instructions to procure said writ of execution as soon as possible, and to levy the same on the stock of goods and fixtures at 1124 O street, and that said L. W. Billingsley informed said deputy sheriff that there were then no chattel mortgages of record against said stock and fixtures, but that there was liable to be one filed soon.

"21. I find that said J. D. Pope and L. W. Billingsley, attorneys for Ferguson and Gagghagen, respectively, had actual notice of the chattel mortgage held by said Harlan P. Sherwin on said stock at the time said judgment was confessed and before said execution was issued.

"22. I find that H. V. Hoagland, deputy sheriff, had actual notice that there was a chattel mortgage on said stock and fixtures before said execution was placed in his hands, and before he gave the same to C. W. Hoxie, deputy sheriff, for service, but I am unable to say from the evidence whether or not he was aware that said chattel mortgage was held by Harlan P. Sherwin.

"23. I find that said chattel mortgage contained a clause as follows: 'But said possession immediately is transferred to H. P. Sherwin, and all the money realized from the sale

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of goods to apply on said notes as same become due, by J. H. Pinkerton, agent of H. P. Sherwin;’ and I find that J. H. Pinkerton continued in the said store at all times from August 1, 1890, to September 22, 1890, but I find that he was not there in possession of said stock as agent of H. P. Sherwin.

“24. I find that on the evening of September 22, 1890, the plaintiff H. P. Sherwin took possession of the said stock and fixtures for the purpose of securing the payment of the amount due under the chattel mortgage, and to secure the payment of rent due and unpaid, and that such possession was taken under the provisions of said chattel mortgage, and according to an agreement with L. L. Gagghagen.

“25. I find that immediately after said judgment was confessed the said L. L. Gagghagen left the court house and proceeded to the store, 1124 O street, and that about five minutes after his arrival there Deputy Sheriff Hoxie appeared there with said execution and levied the same upon said stock and fixtures.

“26. I find that H. P. Sherwin, plaintiff herein, was in said store when Deputy Sheriff Hoxie entered with said execution, and that said Sherwin informed said Hoxie of his, plaintiff’s, claim upon the said stock and fixtures before said Hoxie attempted to assert possession of said stock and fixtures, and immediately after said Hoxie had made minute of the levy on said writ of execution.

“27. I find that said judgment was confessed at about 11 o’clock, execution issued at 11:30, and levy made at 11:50 o’clock A. M. of the 25th day of September, 1890.

“28. I find that J. H. Pinkerton had possession of the stock and fixtures under the terms of the mortgage given by Gagghagen to Sherwin at the time the execution was levied, and that he has not relinquished such possession.

“29. I find that Samuel McClay, defendant herein, was absent from the city of Lincoln on the 25th day of September, 1890, and did not return until noon of September

26, 1890, and that he knew nothing of the confession of said judgment or the issuance and levy of said execution until his said return.

“30. I find that nothing has been paid upon the promissory note given by L. L. Gaghagen to H. P. Sherwin, and that there is now due and unpaid thereon the principal sum of \$1,570.36, with \$45.35 interest from August 1, to December 10, 1890, at ten per cent; total, \$1,615.71.

“31. I find that at the time the said execution was levied the said deputy sheriff, Hoxie, placed F. C. Quinby, a clerk in said store, in charge of said stock and fixtures, as agent for the sheriff, and that said H. P. Sherwin claimed possession of said stock and fixtures at the same time, and I find that it was agreed that said store should be kept open and sales should proceed until the termination of this suit, and that J. H. Pinkerton should take charge of money received to await the termination of this suit, and that neither said Sherwin nor said McClay were to waive any rights thereby; and I further find that F. C. Quinby has remained in said store since said 25th day of September, 1890, as a representative of Sam McClay, sheriff.

“32. I find that the plaintiff herein has not done, or suffered to be done, any act which as a matter of fact, as distinguished from one of law, should postpone plaintiff's rights to those of any of the defendants herein.

“33. I find that there was due Harlan P. Sherwin from L. L. Gaghagen, for rent of the room occupied by the stock of drugs and fixtures, the sum of \$200 on September 25, 1890, being for two months, from July 25, 1890, to September 25, 1890, at \$100 per month.

“34. I make no finding upon the latter clause of defendants' second request, for the reason that the same is a question of law, to be determined by the court.

“35. I find that said stock of drugs and fixtures occupied the east side of the store-room, 1124 O street, and that there was a stock of boots and shoes on the west side

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of said room, and that access to both stocks is gained through the same door.

**"36. I find that Harlau P. Sherwin has not made contradictory statements as to the extent and duration of his possession of said stock of drugs and fixtures.**

**"The above findings are based upon the evidence in the case and are intended to cover all requests made by either party, as well as all the material issues of the case.**

"Respectfully submitted,  
H. J. WHITMORE,  
*"Referee."*

Exceptions were taken to several of the above findings, which were all overruled and a decree entered in accordance with the prayer of the petition.

1. The first proposition of the appellants which calls for notice is that the plaintiff has an adequate remedy by an action of replevin, or for the conversion of the mortgaged property, hence the petition fails to state a cause for equitable interference. We think that the question of jurisdiction is not presented by the record as submitted to this court. Where courts, like ours, are clothed with both common law and equity powers, relief will not always be denied on the ground that the plaintiff has mistaken his remedy. The rule is that where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. (*Bank of Utica v. City of Utica*, 4 Paige Ch. [N. Y.], 399; *Tenny v. State Bank*, 20 Wis., 164; *Savery v. Browning*, 18 Ia., 246; *Amis v. Myers*, 16 How. [U. S.], 493; *Niles v. Williams*, 24 Conn., 284; *Dearth v. Hide & Leather Nat. Bank*, 100 Mass., 541; Hawes, Jurisdiction, 66.) The exceptions to that rule are actions *ex delicto*, for damage only, or *ex contractu*, for debt on written instruments, and possibly others which need not be here enumerated, since it is evident that this is a case for the application of the general rule. It is true the question of jurisdiction is presented by the answer,

but it is clear that the objection on that ground was waived by the subsequent acts of the appellants. From the transcript it appears that the petition was filed on the 11th day of October, 1890. On the 24th day of the same month the order of reference was made, in which appellants were allowed ten days to answer. Their answer was filed November 3, and the reply on November 10. The hearing before the referee was commenced November 19, and his report filed December 15. By the exceptions subsequently filed the report is assailed on the sole ground that the findings are not sustained by the proofs. There was no ruling on the subject of jurisdiction; nor does it appear that the attention of the court was ever called to the fact that that question was put in issue by the pleadings. The answer, which was in the nature of a demurrer, distinctly presented the question of the jurisdiction of the court, and appellants were entitled to a ruling thereon. Assuming that the objection was well taken, it was their duty to move for judgment on the pleadings, or in some manner submit that question for determination by the court; but having elected to take the chances of a favorable determination of the cause on its merits, they will not now, after a protracted and costly trial, be heard to call in question the jurisdiction of the court.

2. It is argued that the mortgage is fraudulent as to creditors of Gaghagen, for the reason that there was no change of possession of the mortgaged property, but, on the other hand, the mortgagor continued in possession and carried on the business by buying and selling in the usual course of trade. It is not seriously urged that the mortgage is fraudulent on its face, and it is clear that it is not, since there is no provision therein which can be construed as a power of sale by the mortgagor. On the other hand, it is expressly stipulated that possession shall be immediately given to the mortgagee. The principle which runs through all of the cases in this court is that where a mort-

gage is not fraudulent on its face, the question of fraud is one of fact for the jury, and that such instrument will not be declared void as to creditors unless the fraudulent intent is shared by both the mortgagor and mortgagee. (See *Hedman v. Anderson*, 6 Neb., 393; *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *Kay v. Noll*, 20 Neb., 380; *Davis v. Scott*, 22 Neb., 154.) The fact that the mortgagor of personal property of the character here involved is permitted to retain possession thereof and sell from the stock in the usual course of business raises a presumption of fraud as to creditors and casts upon the mortgagee the burden of proving good faith. But we have been referred to no case holding that the retention of possession and sale by the mortgagor will *per se* render void a mortgage which is not fraudulent on its face.

3. It is found by the referee (finding No. 24) that Sherwin, on September 22, 1890, took possession of the property in controversy by virtue of his mortgage, according to an agreement with Gagghagen, and also (finding No. 28) that J. H. Pinkerton was in possession of said property by virtue of the mortgage at the time of the levy thereon to satisfy the execution against Gagghagen. Whatever may be the rule elsewhere, it is settled in this state that fraud of the character here charged is available to those creditors only whose attachments or executions are levied before the delivery of possession to the mortgagee under the terms of the mortgage. (See *Fitzgerald v. Andrews*, 15 Neb., 52; *Kay v. Noll*, *supra*.) But it is contended that we should disregard the findings mentioned on the ground that they are against the clear weight of the evidence. Sherwin testifies that on the evening of the 22d he demanded possession under his mortgage, and that the property was at that time turned over to him by Gagghagen without objection, and that it was immediately placed in the custody of Pinkerton, in which he is fully corroborated by the latter. He is contradicted by Gagghagen, who is to some extent

corroborated by Quinby, a clerk in the store. A finding for the appellee based upon such testimony will not be disturbed by this court on the ground that it is not in accordance with the weight of the evidence. It is needless to cite authority for the rule which governs in such cases and which has been so often applied in this court.

4. Lastly, it is contended that the mortgage is void as to creditors of Gaghagen by reason of the disparity between the value of the property mortgaged and the amount of the debt secured thereby. We might dismiss that claim with the remark that it does not appear to have been made either before the referee or the court on the motion for judgment on the findings. The value of the property is not found, but assuming it to be \$5,600, as claimed by appellants, the mortgage will not be declared void on that ground alone: First, because the case is still within the principle of *Fitzgerald v. Andrews* and *Kay v. Noll*; second, the debt secured is a part of the purchase price of the property mortgaged. We are referred to no authority and can conceive of no principle which can be invoked to defeat as fraudulent a mortgage of chattels executed and received in good faith to secure the price thereof on the ground that the security is excessive. *Morse v. Steinrod*, 29 Neb., 108, *Brown v. Work*, 30 Neb., 800, and *Thompson v. Richardson*, 33 Neb., 714, relied upon by appellants, do not conflict with this view. The property in each of these cases was merchandise which had been sold and delivered in the usual course of trade on the credit of the mortgagor. There is some reason for the contention that general creditors have rights in property of that character, and that as to them a so-called "blanket mortgage" is fraudulent and void. But in this case the property was not sold on the credit of Gaghagen and did not, when the mortgage was executed, appear among the assets available for the satisfaction of his general creditors. The reason for the rule stated in the cases named is therefore wanting. But speaking for himself, the

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writer understands those cases to hold merely that a mortgage upon property greatly exceeding in value the amount of the debt secured is evidence of fraud, which may be sufficient of itself to sustain a finding of actual fraud, and not that it will, as a matter of law, render the security void. Those cases, it is assumed, were rightly decided upon the facts; but the proposition that a mortgage is fraudulent *per se* because it covers property in excess of the debt secured cannot be sustained either upon reason or authority. We find no error in the record and the judgment of the district court is

AFFIRMED.

RYAN, C., took no part.

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39	252
48	864
39	252
44	378
39	252
46	146

### CHARLES F. HAMMOND V. STATE OF NEBRASKA.

FILED FEBRUARY 7, 1894. No. 5312.

1. **Criminal Law: DELAY IN TRIAL: DISCHARGE OF ACCUSED.**  
A defendant in a criminal prosecution who has never been committed to jail, or otherwise detained in custody, is not entitled to be discharged, under the provisions of section 390 of the Criminal Code, on the ground that he has not been brought to trial before the end of the second term after the finding of the indictment or the filing of the information.
2. ———: ———: ———. The provision of section 391 of the Criminal Code, for the discharge of any person indicted who after having given bail shall not be brought to trial before the end of the third term of court held after the finding of such indictment, is held to exclude the term at which the indictment is found.
3. **Rape: EVIDENCE: INSTRUCTIONS.** In a prosecution under section 11 of the Criminal Code, for rape upon the daughter of the accused, fourteen years of age, an instruction that "the amount of struggle and resistance necessary to be shown is not the same in all cases. A strong, able-bodied woman could protect herself when a child could not; and a father could overcome and subdue

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the will of his child when a stranger could not," is not objectionable on the ground that it gives undue prominence to the age of the prosecutrix and her relation to the accused.

4. ———: CORROBORATION OF PROSECUTRIX. In a prosecution for rape it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact, provided the jury must be satisfied from a consideration of all of the evidence, beyond a reasonable doubt, of the guilt of the accused. (*Fuger v. State*, 22 Neb., 332.)

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

*J. C. Johnston, O. W. Cromwell, and N. Rummons*, for plaintiff in error.

*George H. Hastings, Attorney General*, for the state.

POST, J.

At the September, 1891, term of the district court of Lancaster county the plaintiff in error Charles F. Hammond was convicted of the crime of rape, as defined by section 11 of the Criminal Code, upon his daughter Alta Maud Hammond, and has brought the case into this court for review upon exceptions taken to certain rulings of the trial court. The first of the errors assigned is the overruling of a motion to dismiss, in the following language:

"STATE OF NEBRASKA	}	Defendant's Motion.
V.		
CHARLES F. HAMMOND.		

"Now comes the said Hammond, being first duly sworn upon his oath, says that he comes before the court, and moves the court here that he be discharged and released from arrest under the said information, for that the said information was filed in said court on the 15th day of September, 1890, that being the first day of the September

term, A. D. 1890, of our said court; that since said day there has been an October term, 1890, of said court and a January term, A. D. 1891, of said court, and that said cause has been pending longer than to the third term of the said court held after the said information was filed; that the delay of the trial of said cause did not happen upon the application of this defendant and was not occasioned by the want of time to try the same, and through no fault of his; and under and by virtue of section 390 and section 391 of the Code of Criminal Procedure of the state of Nebraska, affiant should be discharged from the offense alleged in said information and be permitted to go hence without day; that this cause has not been legally reinstated and cannot be so without new information and indictment, which same has not been found nor information filed."

Sections 390 and 391, referred to in the motion, are as follows:

"Sec. 390. If any person indicted for any offense and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on application of the prisoner.

"Sec. 391. If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen to be on his application, or be occasioned by the want of time to try such cause at such third term."

It is shown by the transcript that the information was filed on the 15th day of September, 1890, which was the first day of the September term. On the following day the accused was arraigned and entered a plea of not guilty.

On the 9th day of February, 1891, which was the first day of the February term, the case was stricken from the docket on motion of the county attorney, with leave to reinstate upon the showing of sufficient cause therefor, and the sureties on the recognizance of the accused were discharged and released from further liability. On the 12th day of October, 1891, which was the nineteenth day of the September, 1891, term, the following order was entered of record:

"STATE OF NEBRASKA      }  
                                  v.  
CHARLES F. HAMMOND.    }"

"Now on this day came the county attorney on behalf of the state of Nebraska, and having made proper showing in compliance with the order entered herein on the 9th day of February, 1891, on his motion it is by the court ordered that this cause be, and the same hereby is, reinstated on the docket of this court, and that a *capias* issue for the said defendant in the manner provided by law."

It is evident that the accused was not entitled to be discharged under the provisions of section 390, since it does not appear from the transcript that he was at any time, subsequent to the filing of the information, confined in the jail of the county, or otherwise detained in custody. It is equally clear that he was not entitled to a discharge under the provision of section 391. The expression "before the end of the third term held after indictment," etc., must be construed as excluding the term at which the indictment is found. Any other construction would be a distortion of a statute the provisions of which are in no sense ambiguous. The third term after the filing of the information, according to the foregoing affidavit, was the September, 1891, term, at which the plaintiff in error was convicted. The court did not err, therefore, in overruling the motion to discharge.

2. Exception was taken to paragraph No. 6 of the charge given by the court on its own motion, as follows:

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“The degree or amount of struggle and resistance necessary to be shown on the part of the prosecutrix is not the same in all cases. A strong, able-bodied woman could protect herself when a child could not. The father of a child could subdue and overcome the will of his child when a stranger could not. In all cases the jury are to consider the circumstances surrounding the parties, the ability of the woman to resist, her opportunity of getting aid, the comparative strength of the two parties, their relations, as in the case of a father and daughter, his general right to command, and her general duty to obey, and if, from all the circumstances, it appears beyond a reasonable doubt that the father, by force, threats, or putting in fear his daughter, overcame her will, and against her will forcibly and carnally knew her, he should be held criminally responsible for his act.”

The vice imputed to this instruction is that undue prominence is therein given to the age and strength of the prosecutrix, who, as shown by the evidence, was under fourteen years of age at the time of the alleged assault, as well as her relation to the accused. This instruction should be read in connection with paragraph No. 5, in which the jury were told that “in order to convict they must find that the prosecutrix resisted to the extent of her ability in view of the circumstances surrounding her at the time.” Such undoubtedly is the general rule, but to that rule there are some recognized exceptions, among which is that where the female assaulted is very young and of a mind not enlightened on the subject, the law exacts a less determined resistance than in the case of an older and more enlightened person. (2 Bishop, Criminal Law, 1124; Wharton, Criminal Law, 1143.) Thus, a female under ten years of age was by the common law deemed incapable of consent, and by statute in this state the age of consent has been raised to fifteen years. (Criminal Code, sec. 12.) Another exception to the rule is where the submission of the prosecutrix is induced

by fear or fraud, or through the coercion of one whom she is accustomed to obey, such as a parent or one standing *in loco parentis*. (Wharton, Criminal Law, 1144; *State v. Cross*, 12 Ia., 67; *Strang v. People*, 24 Mich., 1; *Whittaker v. State*, 50 Wis., 518; *Reg. v. Jones*, 4 L. T., n. s. [Eng.], 154.) In view of the evidence adduced in this case, the court, after stating the general rule, was justified in directing the attention of the jury to the qualifications to which reference has been made. There exists a wide difference between consent and submission, particularly in the case of a female of tender years when in the power of a strong man. Mere submission in that case is essentially different from such a consent as the law declares to be a justification of the act. (3 Russell, Crimes, 934.) Coleridge, J., in *Reg. v. Day*, 9 C. & P. [Eng.], 722, thus distinguishes: "Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken as such consent."

3. Exception was taken to paragraph No. 7 of the charge of the court, as follows:

"In case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. And if the jury believe from the testimony of the prosecutrix and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault as charged and did carnally know his daughter, forcibly and against her will, and are so convinced beyond a reasonable doubt, the law would not require that the testimony of the prosecutrix should be corroborated by witnesses as to what transpired in the room when it is alleged the assault was made."

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This instruction embodies the rule as stated in *Fager v. State*, 22 Neb., 332, and the exception is therefore without merit.

4. It is contended that the verdict is not supported by the evidence. It is deemed unnecessary to give more than a brief synopsis of the evidence in the opinion. It is sufficient to say that, according to the testimony of the prosecutrix, she was at home on the morning in question with the accused and the younger children of the family; that in obedience to his command she went into the house from the yard where she was engaged at play with the other children; that he committed an assault upon her and finally accomplished his purpose by force and against her will. She describes with particularity the assault, her resistance, the struggle which ensued, in which her underclothing was torn off, and which ended in the violation of her person. It is shown that she immediately made complaint to a neighbor woman, describing the treatment to which she had been subjected. Dr. Gibson, who examined her a few hours later, observed that her private parts were considerably bruised; they were also torn and were then bleeding. She is contradicted, it is true, upon every material point by the testimony of the accused; but all questions of fact were fairly submitted to the jury, and the verdict will not be disturbed on the ground that the evidence is conflicting. That proposition is sustained by numerous decisions of this court and may be regarded as the settled law of this state. We find no error in the record and the judgment of the district court will be

**AFFIRMED.**

## JOHN JOSEPH ET AL. V. CHARLES M. SMITH.

FILED FEBRUARY 7, 1894. No. 5373.

1. **Statute of Frauds.** A party who has cared for and fed certain stock for another, the bill therefor, or a part of it, being unpaid, the stock, with some other chattel property of his debtor, being in his possession under a verbal lien to secure the payment of the balance due on his account, such lien to be valid so long as such property shall remain in said creditor's possession, who is induced by the direct promise of a third party, such third party claiming a prior lien on the live stock so held, by reason of a chattel mortgage, that said third party will pay the account so due said first party if he will release from his possession such stock and chattels, to so release and surrender possession of the property, and this action is an advantage or benefit, or forwards the interests of the party making such promise, can maintain an action against such promisor, the promise not being within the statute of frauds.
2. The instructions given by the court on its own motion, and instructions requested by defendant in error and given, and instructions requested by plaintiff in error and refused examined, and held no error in either the giving or refusing.

ERROR from the district court of Saunders county.  
Tried below before BATES, J.

*Simpson & Sornborger*, for plaintiff in error, cited: *State Bank of Nebraska v. Lowe*, 22 Neb., 68; *Mallory v. Gillett*, 21 N. Y., 412; *Duffy v. Wunsch*, 42 N. Y., 243; *Pfeiffer v. Adler*, 37 N. Y., 164; *Brown v. Weber*, 38 N. Y., 187; *Belknap v. Bender*, 75 N. Y., 446; *Ackley v. Parmenter*, 98 N. Y., 425; *Rintoul v. White*, 15 N. E. Rep. [N. Y.], 318; *Nelson v. Boynton*, 3 Met. [Mass.], 396; *Curtis v. Brown*, 5 Cush. [Mass.], 488; *Furbish v. Goodnow*, 98 Mass., 299; *Dows v. Sweet*, 120 Mass., 322; *Preston v. Young*, 46 Mich., 103; *Cross v. Richardson*, 30 Vt., 649; *Fullam v. Adams*, 37 Vt., 391; *Emerson v. Slater*, 22 How. [U. S.], 28; *Clapp v. Webb*, 9 N. W. Rep.

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[Wis.], 798; *Stewart v. Jerome*, 38 N. W. Rep. [Mich.], 895; *Baer v. English*, 11 S. E. Rep. [Ga.], 453.

*J. R. Gilkeson and H. Gilkeson, contra.*

HARRISON, J.

The plaintiff in this action in the lower court (defendant in error here) filed a petition alleging the copartnership of the defendants, and further, that on or about the first day of May, 1887, and for some time prior thereto, this plaintiff was in possession of certain personal property, to-wit, about \$750 or \$850 worth of personal property, consisting of horses, mules, work harness, wagons, wheel scrapers, etc., said property being held by this plaintiff and in the possession of this plaintiff at the said time for the purpose of securing a claim of \$196.30 this plaintiff had against one J. B. O'Connell for feed furnished said horses and mules, for money advanced to said O'Connell by this plaintiff, and for livery furnished said J. B. O'Connell by this plaintiff; that on or about the first day of May, 1887, while said plaintiff was in possession of said property, and while said plaintiff was retaining possession of said property to secure the payment of said \$196.30 from said J. B. O'Connell, defendants John Joseph and William Grafe came to plaintiff and represented to plaintiff that these defendants had a claim of \$500 against said J. B. O'Connell, and that it would be greatly to the advantage of said defendants if said plaintiff would release his lien on said property and turn the said property over to the said J. B. O'Connell; and said defendant, on condition that said plaintiff would release his lien on said property and turn said property over to said J. B. O'Connell, agreed to assume and pay said amount of \$196.30 due and payable from said O'Connell to this plaintiff; that relying on the said agreement and undertaking of said defendants, this plaintiff released said lien on said property, and surrendered his pos-

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session of said property, and turned said property over to said J. B. O'Connell, and assigned his claim of \$196.30 to the said defendants, and turned the evidence of same over to the said defendants; that on or about January 1, 1891, defendants paid plaintiff \$44.25; that there was still due plaintiff the sum of \$191.65, and interest at seven per cent per annum from March 4, 1891, for which plaintiff prayed judgment. Defendants Joseph and Grafe answered, admitting the existence of the partnership and denied each and every other allegation of the petition. There was a trial to a jury and a verdict for plaintiff in the sum of \$204.13. Motion for a new trial was filed, submitted, and overruled, and judgment was entered on the verdict for plaintiff, and defendants Joseph and Grafe brought the case to this court on error.

The facts, as they appear from the evidence, are substantially as follows: During the fall, winter, and spring of 1886 and 1887, one John B. O'Connell, a railroad contractor, was working on sections of a railroad then being constructed in and through Saunders county, Nebraska, and while there, and so engaged, had bought supplies of Joseph & Grafe, who were running a general store in Wahoo, in said county, and became indebted to them in a considerable sum. He also had dealings with the plaintiff Smith, then proprietor of a livery and feed stable, and became indebted, to the amount of the account in suit, for the care and feeding of some stock, horses, and mules, and for which plaintiff says O'Connell had given him a verbal lien on the stock and other property, wagons, and scrapers as security for the payment of the account. He states that O'Connell told him he could hold the property until he was paid his bill. On the 15th of March, 1887, O'Connell executed a chattel mortgage to Joseph & Grafe in the sum of \$500 on the horses of which Smith had possession at the time. He alleges Joseph & Grafe made the promise to him to induce him to surrender the possession of the property. Joseph & Grafe

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had, it appears, loaned or advanced to O'Connell some money, indorsed some of his paper, and furnished him supplies, and by May, 1887, O'Connell owed Joseph & Grafe about \$800. At the time O'Connell completed his contract on the road he moved all his stock and tools to Wahoo and to the stable of Smith, where they were left and cared for. About this time Smith and O'Connell examined their accounts and determined upon the amount due Smith, and he and Smith, according to the testimony on the part of Smith by himself and witnesses, went to the store of Joseph & Grafe and there, in a conversation between Joseph and Smith, Joseph stated to Smith that if he would release or surrender the "stock" or "stuff," they (Joseph & Grafe) would pay his bill or account against O'Connell. This conversation is disputed by Joseph, but it has been passed upon by the jury, and it is not for us to disturb their finding. There is no complaint on this point in the brief of plaintiff, and we think, from an examination of the evidence, that the weight of the evidence supports the conversation as given in the testimony of the plaintiff. The testimony discloses that at this time the firm of Joseph & Grafe had the largest claim against O'Connell and were very anxious that he should have possession of his stock, scrapers, etc., in order that he might get away, obtain work, and earn money with which to liquidate his indebtedness to the firm; that Smith delivered his account against O'Connell to Joseph & Grafe, and also some time checks which he then held, and released the property or surrendered possession of it. We find O'Connell very soon after with it in Saline county; and that after he moved the property to Saline county, probably some time in June, 1887, he executed and delivered to Joseph & Grafe a mortgage in the sum of \$700 on the property surrendered by Smith. There was also evidence showing that O'Connell had assigned and delivered the final estimate for labor performed on the road under his contract to Joseph & Grafe, the same, when received by

them, to be applied to payment of indebtedness of O'Connell to parties in Wahoo. Whether the claim of Smith was included, and one which was to be paid from this fund, is not very clear. It further appears that Joseph & Grafe received this money. There is some other evidence in the case, but we do not think it necessary that it be here quoted or referred to, as it can have no bearing upon the decision of the points raised. Joseph & Grafe have failed and refused to pay Smith, hence the suit.

The first contention in the case is that the promise of Joseph & Grafe to Smith was within the statute of frauds, therefore void. The case of *Rogers v. Empkie Hardware Co.*, 24 Neb., 653, cited in his brief by defendant in error, is, we think, in point. Parties in business at Wahoo turned property over to the Empkie Hardware Company, or its salesman, in payment of the debt due the company; and Rogers' attorney, being sent to collect a claim against the parties who had turned the goods over to the company, in a conversation with the company's salesman then in possession of the goods, was told by him that if he would not interfere with him in the possession of the goods he would pay the plaintiff's claim out of the first money received from the sale of the goods. This was accepted and acted upon, and afterwards the company sold the stock of goods and refused to pay Rogers' claim. It was argued that the promise was within the statute of frauds. The court held on this branch of the case as follows: "A direct promise of an agent of a wholesale mercantile establishment, who is in the possession of the goods of an insolvent firm in satisfaction of a debt of his principal, made to an attorney of another creditor of such insolvent firm, to pay a claim held by said attorney against said firm if he will not disturb him in the possession of the goods, is not a promise to answer for the debt of another, and need not be in writing;" and in the body of the opinion we find the following statement: "The first question presented is whether or not the contract was

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a promise to pay the debt of another, and therefore necessary to be in writing. The promise is direct—that the salesman would pay the debt if not disturbed. He had at that time more goods in his hands than were necessary to pay the defendant's claim. His promise was not conditional, but absolute, and for a benefit to be received by the promisor or his principal. In such case, the promise need not be in writing." All the benefit received by the promisor in the above case was that he was not disturbed in his possession by the other party, of more goods than were necessary to pay his debt. In the case at bar Smith had possession, and of property other than that covered by the mortgage to Joseph & Grafe, and in order that O'Connell might have the property to enable him to earn sufficient money to pay the debt of Joseph & Grafe (certainly a benefit to the firm) they induced Smith to surrender such possession. To gain possession of the property held by Smith without the trouble and expense necessary to contest his possession, not only of the stock on which they claimed to hold a prior lien, but other articles to which they had no claim, and turn it over to O'Connell, that he might be able to go to work and earn money to be paid on their claim, they make a promise to Smith not to pay Smith's bill if O'Connell fails to pay it, but a direct and unequivocal promise and undertaking to pay his claim. Their principal aim in it was not so much to further O'Connell's interests but their own. If they could obtain possession of the stock and other articles for O'Connell, or have them surrendered to him, he could work and pay their bill, and if not, the possibility of their ever receiving it was very remote. To secure the possession and to induce Smith to give up the same without trouble and probably litigation and more or less expense, the promise was given. Under the rule established in our state, the consideration was sufficient and the promise was valid.

In *Fitzgerald v. Morrissey*, 14 Neb., 198, the following

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rule was announced : " Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid, though not in writing. In such case the promisor assumes the payment of the debt." To the same effect are *Davis v. Patrick*, 12 Sup. Ct. Rep., 58 ; *Emerson v. Slater*, 22 How. [U. S.], 28, 43 ; *Mathews v. Seaver*, 34 Neb., 592 ; *Muller v. Riviere*, 46 Am. Rep., 291, 59 Tex., 640 ; *Leonard v. Vredenburg*, 8 Johns. [N. Y.], 29 ; *Nelson v. Boynton*, 3 Met. [Mass.], 400 ; *Williams v. Leper*, 3 Burr. [Eng.], 1886 ; *Conrad v. Sullivan*, 15 Am. Rep., 261, 45 Ind., 180.

The plaintiff in error excepted to the giving of instruction No. 1, as requested by plaintiff in court below, and alleges it for error, and this is one of the errors insisted upon and argued in the brief for him in this court. This instruction is as follows :

"The jury are instructed that a verbal contract of the pledge of personal property to secure a debt, when the party to whom the pledge is given has possession of the property, is valid and legal and will be a lien upon the property so pledged so long as it remains in the possession of the party to whom the lien is given. And if, in this case, you find that the said J. B. O'Connell gave the plaintiff in this case a lien on the property described in the plaintiff's petition, and that the said defendants, while the said property was in the possession of the plaintiff, agreed with the plaintiff that they should pay the plaintiff's claim if he would surrender possession of the said property, and that in consideration of the said agreement of the said defendants, the plaintiff released the said property and surrendered possession thereof, this would be a valid consideration for the agreement of defendants to pay the said plaintiff, and the said agreement would be binding upon the defendants."

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This instruction embodies the proposition that the case made in the evidence was not within the statute of frauds, and for this reason is claimed to be erroneous by attorneys for plaintiff in error; but as we have disposed of this question unfavorably or adversely to his contention, it disposes, therefore, of his objection to the above instruction; and we may further add that the court had instructed the jury as to the burden of proof in its instruction No. 3, in connection with which this must be read and construed.

The plaintiff in error offered an instruction numbered 4, which was as follows:

“ You are instructed that before the plaintiff can recover in this case, he must show by a preponderance of the evidence not only that the defendant promised to pay the debt of O’Connell, but that, in addition to such promise to pay the same, the defendants obtained an advantage by reason of such promise, which they did not before have.”

The court refused to give this instruction, which was excepted to by plaintiffs in error, and the refusal to give the instruction is assigned as error. The subject of this instruction was covered by No. 1, asked by defendant in error, and there was no error in such refusal. It has been frequently held by this court that where an instruction has been given on a point in controversy in a case, it is not error to refuse to give another instruction submitting the same in substance on the same point.

It is also urged that the court erred in giving instruction No. 2, requested by defendant in error, which reads as follows:

“ The jury are instructed that if you find by the evidence that the defendant John Joseph was acting for the firm of Joseph & Grafe, then any contract made in reference to the payment of the plaintiff’s claim, if you find any was made, would be binding upon said firm, and both of the defendants would be bound by said contract.”

We have already disposed of the question, as to whether

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or not the promise to pay Smith's bill was founded upon anything which was of benefit, or would forward the interests of Joseph & Grafe, in the affirmative; and the attorneys for the plaintiffs in error in their able brief, on page 9, say on this subject: "Had these acts of one member been such as to advantage the firm, to further its interests, \* \* \* then the act of John Joseph would have been the act of the firm." This, we believe, is correct; and having, as before stated, found that such act benefited the firm, and that the evidence given warranted such a conclusion when construed with the other instructions, especially No. 1, asked by defendant in error and given, we think the instruction was correct.

The court below refused to give instruction No. 3, requested by plaintiffs in error, and this is complained of as error. The instruction was as follows:

"The jury are instructed that the mere delivery of an itemized statement of the account of the plaintiff against the man J. B. O'Connell to the defendants will not be in itself sufficient to prove an assignment from the plaintiff to defendant."

Whether the above is correct or not cannot, we think, affect the result of this case. The court below did not give any instructions in reference to the question of the assignment of the account as alleged in the petition and denied in the answer and the evidence introduced in regard to its delivery to the plaintiff in error. After careful consideration and much deliberation, we are unable to discern any tendency, in the refusal of the court to instruct the jury on this point, prejudicial to the rights of the plaintiffs in error. In order to arrive at the verdict returned by them, the jury, from the very nature and component parts of the case, were forced to conclude first that the conversation occurred and the promise was made to pay Smith's claim on surrender of the possession of the property. This was sufficient to sustain the verdict without any consideration of the as-

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signment of the account as one element of the transaction. In other words, the question of the assignment was one of the subordinate or collateral elements of the proof, and amounted to nothing without the main elements, on which it depended or to which it was collateral, being first established. In other words, there must have been sufficient proved, and the jury must have been convinced of such facts that their verdict on such conclusion would be as it was, for plaintiff (defendant in error), before they reached the consideration of the question of assignment or no assignment in their deliberation, and hence if it was error to refuse the instruction, it was error without prejudice, and does not call for a reversal of the case.

The giving of instruction No. 6 by the court on its own motion is also alleged as error. The following is a copy of the instruction:

“If the jury find for plaintiff, you will find for him in the sum of \$191.65, with seven per cent per annum from March 4, 1891.”

We cannot discover wherein the plaintiffs in error are prejudiced in the giving of this instruction. To make it as favorable for the plaintiffs in error as possible, the defendant in error would be entitled to interest on the account from December 1, 1887, or six months after the date of the last item in the account. Taking the last item in the account to be June 1, 1887, which is probably a few days later than it should be fixed, the verdict is by a small sum in favor of the plaintiffs in error as to amount; and we conclude there was no error in the instruction of which they could complain.

This disposes of all the alleged errors argued in the briefs, and we conclude that the case was fairly submitted to the jury, and the verdict of the jury was right, and the judgment is

**AFFIRMED.**

**OMAHA NATIONAL BANK v. D. E. THOMPSON.**

FILED FEBRUARY 7, 1894. No. 5142.

1. **Instructions.** Where the principles embodied in instructions asked on behalf of one of the parties to an action have already been stated to the jury by the court, it is not prejudicial error to refuse the reiteration requested.
2. **An instruction** abstractly correct as to propositions of law is properly refused when inapplicable to any state of facts in support of which evidence has been introduced.
3. **Witnesses: LIMITATION OF CROSS-EXAMINATION.** While great latitude must of necessity be given in the cross-examination of witnesses charged with participation in fraudulent transactions which are the subject-matter of the defense pleaded, yet this latitude is subject to limitation in the sound judicial discretion of the trial judge, and unless it is made to appear in this court that such discretion has been exercised to the injury of the complaining party, the judgment will not be reversed merely because of such limitation.

**ERROR** from the district court of Douglas county. Tried below before **FERGUSON, J.**

*Hall, McCulloch & English*, for plaintiff in error.

*John D. Howe and Charles O. Whedon*, contra.

**RYAN, C.**

1. This action was brought in the district court of Douglas county by the defendant in error to recover of the plaintiff in error the value of a certain stock of jewelry, together with the tools, safe, and furniture used in connection therewith, all of which had been previously mortgaged by Edholm & Akin, the owners thereof, to the defendant in error, to secure the payment of upwards of \$37,000, evidenced by certain promissory notes of the said mortgagors given to the defendant in error. This mortgaged property

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had been levied upon for the satisfaction of a large claim due from Edholm & Akin to the plaintiff in error, and had been sold for that purpose. No complaint of insufficiency of statement is made as to the petition; hence, its contents need not be given with more particularity than has already been done. There was a verdict upon the issues joined, in favor of the defendant in error, in the sum of \$20,000 principal, and \$2,041.65 interest due at the time of the trial. There was ample evidence of the value of the property levied upon and sold to now excuse the necessity of an extended examination upon that question; and it is equally without room for question that the notes and mortgage securing the same were duly made to the defendant in error, and that under said mortgage the defendant in error had taken possession of the mortgaged property, and caused his mortgage to be duly filed for record before the levy of which he complains in his petition. As this evidence under the petition was sufficient to entitle the defendant in error to a verdict if no defense was pleaded, it becomes important to consider carefully such matters as were presented by way of defense. The answer began with a denial of each allegation in the petition contained, save and except such as afterwards in said answer should be expressly admitted. The other averments of the answer were as follows: .

“The defendant says that all of the acts and instruments under which the said D. E. Thompson pretends and claims to have title are made in pursuance of a corrupt and fraudulent conspiracy, contrived, designed, and plotted between the said D. E. Thompson, plaintiff, and the said Nathan J. Edholm and Arthur M. Akin, to cheat and defraud the creditors of said Edholm & Akin, and especially this said defendant, the Omaha National Bank, who was and is a creditor of said Edholm & Akin in a large sum; and this defendant charges the facts to be that prior to the execution of the pretended mortgage or bill of sale pretended to

be made between the said D. E. Thompson and the said Edholm & Akin, the said D. E. Thompson and the said Edholm & Akin agreed and conspired together that said Edholm & Akin should procure goods on credit and should procure credit at the bank of this defendant and other banks wherever credit could be obtained, and that said Edholm & Akin should sell as much of said goods for cash as could be sold for cash, whether the price should be sufficient to pay the first cost or otherwise, and that the said D. E. Thompson should, in such ways as were possible, aid and abet the said Edholm & Akin in procuring such goods and in making such sales, and that it was understood and agreed by and between the said D. E. Thompson and the said Edholm & Akin that after the said Edholm & Akin should obtain all the goods that they could on credit, and all the credit they could at the banks, that the said Edholm & Akin should fail, and that the said D. E. Thompson should thereupon receive a mortgage which should cover everything that the said Edholm & Akin should have; and that under said mortgage, so contrived and plotted to be given, the said D. E. Thompson should hold the residue of said property, so that the creditors should be deprived of any benefit even of the residue of said property, and that the said Edholm & Akin and the said D. E. Thompson should divide the proceeds so fraudulently obtained by said fraudulent contrivance and design. And defendant charges the facts to be that in pursuance of said conspiracy the said Edholm & Akin, in conjunction with said D. E. Thompson, and aided and abetted by the said Thompson, did procure credit from various firms in large amounts, and from the said Omaha National Bank, and did, without paying the said creditors, sell said goods for cash, which cash sales were divided between the said Edholm & Akin and the said Thompson; and in pursuance of said corrupt and fraudulent conspiracy and design contrived as aforesaid by the said Edholm &

Akin and the said Thompson, the said Edholm & Akin and Thompson having procured all the credit and goods that their combined efforts could procure, and having sold all the goods for cash that they could sell, took from the store of said Edholm & Akin a large quantity of the more precious goods and gave to the said D. E. Thompson a pretended mortgage upon the balance, under which pretended mortgage the said Thompson did claim the balance of said goods, and did claim and withhold from the creditors even the residue, which said goods were such goods as could not be sold by the said Thompson, Nathan J. Edholm, and Arthur M. Akin for cash; all of which said acts and doings were in pursuance of said fraudulent and corrupt conspiracy and design plotted and contrived between the said D. E. Thompson and Edholm & Akin as aforesaid set out.

“And the said D. E. Thompson, under and by means of this corrupt scheme and design, and by means of various instruments, including the pretended chattel mortgage mentioned in the petition herein, has obtained large sums of money, goods, and credits of the value of thirty thousand dollars (\$30,000) or more, arising from the proceeds of said stock so obtained by said Thompson and Edholm & Akin, and converted the same to his own use in fraud of the rights of the creditors aforesaid, and in fraud of the rights of the Omaha National Bank as a creditor.

“And this defendant charges the facts to be that said D. E. Thompson paid no consideration whatever for any of the instruments by which he obtained the said goods aforesaid, nor did the said D. E. Thompson pay any consideration or advance any money for the said mortgage under which he claims title to said property; but that all of the said instruments were obtained by the said D. E. Thompson in pursuance of said fraudulent conspiracy and design, and not otherwise; and the said D. E. Thompson was and is a partner of the said Edholm & Akin in their

said conspiracy and business, and was and is liable to the creditors of the said firm for the debts thereof.

"And this defendant avers that there is now due to this defendant from said firm the sum of \$20,000, for which said Edholm & Akin and Thompson are liable to this defendant.

"Wherefore the said defendant prays judgment against the said D. E. Thompson for the sum of twenty thousand dollars (\$20,000) and its costs in this behalf most wrongfully sustained." •

To the quoted averments of the answer there was a reply in denial, except that the reply admitted the execution of the mortgage to which reference is made in the answer. While the averments of this answer, among other things, charged incidentally that D. E. Thompson paid no consideration for the notes and mortgage made to him, yet this allegation of the want of consideration is coupled with, and dependent upon, the further allegation that the execution of the notes and mortgage was in pursuance of a corrupt conspiracy entered into by said Thompson with the firm of Edholm & Akin. Fairly construed, it follows that there is but one defense aside from the general denial in the introductory part of the answer. This defense is, that the firm of Edholm & Akin entered into a fraudulent and corrupt conspiracy with D. E. Thompson, the object of which was the obtaining of as many goods as possible by Edholm & Akin, the sale of said goods without reference to their cost price, and the participation by Thompson in the proceeds of said sales, and the covering up of the residue, after such sales as were possible had fully been made, by means of the chattel mortgage executed by Edholm & Akin to the said D. E. Thompson. The answer does not charge that the mortgage was made by Edholm & Akin to D. E. Thompson for the sole purpose of hindering, delaying and defrauding the creditors of said Edholm & Akin, and that said Thompson either received said mortgage in

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furtherance of that intention or with knowledge of the same, actual or implied. The defense was of a conspiracy in which from its inception Thompson was an active participant, and that the mortgage was merely one of the final steps in accomplishing the result attempted by the conspiracy. The district court very liberally construed these averments of the answer however, and allowed the proofs under its averments as though such averments were simply of the ordinary allegations as to a fraudulent conveyance, in respect of which fraudulent intention of the mortgagor the mortgagee had actual or implied notice.

2. The complaints as to the instructions are very numerous and point out in great detail the matters criticised. It would subserve no useful purpose to follow consecutively the comparisons, criticisms, and complaints made by the plaintiff in error in respect to each instruction. It is sufficient to say, in general, that the instructions asked by the plaintiff in error, where not given in the exact language in which they were drawn, were, in effect, given by the judge in the instructions prepared by him. To this proposition there is but one exception, and that is upon the refusal of the court to give the twelfth instruction asked by the plaintiff in error. This instruction was in the following language: "Although the jury may believe from the evidence that there was a good consideration for a portion of the amount mentioned in the mortgage, still if the jury believe from the evidence that there was no consideration for the balance of the amount so mentioned, and that said notes and mortgage were given for a greater amount for the purpose of defrauding, hindering, and delaying the creditors of said mortgagor, then the said mortgage is wholly void and confers no right whatever upon the plaintiff, and your verdict will be for the defendant." This instruction was very properly refused, because there was no evidence whatever from which the jury could find that the notes were given for a less amount than was evidenced by

their terms. It requires no citation of authorities to establish what this court has uniformly held, that the refusal to give an instruction abstractly correct, yet applicable to no theory sustained by any evidence, is not prejudicial error.

3. In this case the testimony was for the most part directed to the value of the property levied upon and sold to satisfy the claim of the bank. In the nature of things it was very conflicting. As to some matters, it was utterly irreconcilable. Very much might profitably have been omitted. None offered, however, was improperly excluded. Counsel for plaintiff in error insists that the cross-examination was improperly restricted, and instances the exclusion by the court of the cross-interrogatory propounded to Edholm, a member of the firm of Edholm & Akin, as to when he commenced to have business relations with D. E. Thompson. After this ruling, counsel asked the same witness this question: "What were your relations with Mr. Thompson, the plaintiff in this case?"—and without a ruling, voluntarily withdrew it before it could be answered. There is no prejudicial error discovered in this assignment.

Again, counsel for plaintiff in error complains that on cross-examination he was not permitted to inquire whether or not Thompson was a partner with Edholm & Akin. As to whether or not this partnership relation might have been proved upon direct examination admits of grave doubt, for in the answer it was only charged that Thompson was a partner in the conspiracy; that is, in effect, a co-conspirator. Proof of an agreement to share profits and losses in a business undertaking, without more, would hardly be admissible to prove a conspiracy. Certainly there was no room for such proof upon cross-examination in this case. On his cross-examination Arthur M. Akin, a member of the firm of Edholm & Akin, testified that he had learned the value of a circular counter in controversy by pricing one like it in Chicago with a dealer in such goods, and that he knew what this particular counter originally

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cost. Counsel complained that thereupon the court did not sustain his motion to strike out all the evidence which had been given by this witness as to the market value of the counter. To have sustained this motion would have withdrawn from the consideration of the jury direct, competent evidence upon this point which was clearly involved in this controversy. The motion, therefore, could not be sustained so far as to reach the evidence given on the direct examination, and it would have been equally anomalous to have sustained it to the extent that this cross-examination should have been excluded upon motion of the attorney who conducted it.

Again, counsel for plaintiff in error contends that it was error to limit Akin's cross-examination to the inquiry whether the said Akin had not told a Mr. Bell that Edholm & Akin were going to sell pianos for Mr. Thompson. As the testimony fully discloses the fact that such an arrangement existed as to business conducted in a room separate from that in which were the mortgaged goods, and without the two lines of business being at all confused or mixed with each other, we cannot conjecture what further inquiry would be profitable which would simply tend to elicit testimony of facts as to which there was no controversy. But counsel persisted in his cross-examination of this witness on this line until it was shown that there was a written contract between Thompson and the firm of Edholm & Akin as to the piano business, and that the witness had shown that written contract to Mr. Bell. No attempt was made to compel the production of this writing, and we think the plaintiff in error has no ground of complaint because of the refusal of the court to admit, even on cross-examination, oral evidence of the agreement shown to be in writing.

Complaint is made that the court did not permit counsel to ask Albert Edholm (who was not a member of the firm of Edholm & Akin) whether the ranch in Wyoming was

put in the name of the witness just before the failure of the firm of Edholm & Akin, and it is insisted that such a line of cross-examination was proper, because the witness had been asked on direct examination whether or not none of the credit of the business that he (witness) was doing was derived from Edholm & Akin. On his direct examination he had testified that he was engaged in business on his own account. It was shown that he was never a member of the firm of Edholm & Akin, and he testified that he bought the ranch with his own money, in detail stating from whence it was derived. The ranch consisted of 160 acres. It is difficult to imagine how any cross-examination could have developed anything of importance, even had the court permitted the cross-examination of Albert Edholm as to whether or not the title to the ranch was put in his name. The court very properly excluded further cross-examination on the line proposed.

The final objection made as to the introduction of testimony is difficult to condense. Indeed, it is almost as difficult to understand. It is therefore given by quotation from counsel's brief, in the following language: "So again, Edholm & Akin had told of conversations with Glasburg—conversations under most suspicious circumstances, one of them telling it on reply to a question of Mr. Howe, inserted into our cross-examination, page 780. They tell their side. They deny any attempt to induce him. Yet Glasburg, when he comes on the stand, is not allowed to state his side of those conversations, and when we offer to prove what Edholm & Akin did say in so many words (pages 1228, 1229), an attempt in those very conversations on the part of Arthur Akin and N. J. Edholm to bribe a witness, the court; on the same frivolous objection, says that we have not asked a question which, if asked, would have been leading; refuses our side of this question; protects these parties in the very face of the fact that this offer was before him, and the first question was whether he had had any

such conversations." It is but just to the trial court that the portion of the record complained of should be set out with sufficient fullness to vindicate the ruling made, for, in our view, it can have no other effect. The question propounded to Glasburg was as follows: "Have you had any talk or conversation with any one connected with the opposite side of this case from the bank since this trial begun, with regard to whether or not you were going to testify in the case?" This was objected to as incompetent, immaterial, and calling for the witness' conclusion as to who was connected with the other side of the case. The objection was sustained, and defendant excepted, whereupon counsel for plaintiff in error stated: "We will offer to show by this witness that Nelson J. Edholm and Arthur Akin came to him." At this point counsel for the other side objected to the offer on the ground that the law required that, first, a question should be asked, upon the exclusion of which counsel might make their offer to prove, but not having asked any question it was improper to make tender of proof. This objection was overruled and plaintiff excepted. The court then said that counsel had the right to make the offer, and that the court would rule upon the questions as they arose. Counsel for plaintiff in error then offered to show that Nelson J. Edholm and Arthur M. Akin came to the witness and urged upon him that they were friends of his and that the note which they had heretofore refused to give him of \$200 they were ready to give him, which note had already been paid; and also proposed to pay him some money which they were owing him and urged upon him not to be a witness in this case, nor to tell anything he knew; and also that they were to give him a little house on Twenty-fourth and Lake street, or thereabouts, for a nominal price; also, that another party came to this witness and said to him that he should not testify against Edholm & Akin, that they were young men and that he was a young man, and that he should not testify

against them. Upon inquiry by the court as to what the other side had to say to the offer made, counsel for the other side said: "We have been protesting here, and we now protest, that this witness was not asked any question as to any conversation that he had with Edholm & Akin, and the objection we made to the former question was simply because it was not specific in asking with what party the conversation was had, leaving it for the witness to determine who was connected with the case. We have not yet made any objection to their asking this witness any question." At this point counsel for plaintiff in error interrupted, using the following language: "I object to a long-winded statement of this kind. I have made my offer and they have no right to put a stump speech into this record. If they want to object to that, and if your honor rules it out, all right. I object to any stump speech of Mr. Howe being put into this record now." The court remarked: "I think it is proper for Mr. Howe to put in the record his legal points on which he objects to this evidence, and that is sufficient."

Mr. Hall: "I move to strike out that speech."

Mr. Howe: "I had the floor when I was interrupted."

The Court: "I will strike from the record that statement of Mr. Howe. The matter stands on the offer of Mr. Hall. I ask Mr. Howe or Mr. Whedon to state on the record to what point they objected to the offer, their legal objections, and I will pass upon them."

Mr. Howe: "Our sole objection to their making the alleged proof, stated in their last offer, is simply because they have not stated a question asking for any conversation that the witness had with Akin or any other particular party."

The Court: "The objection is sustained."

Mr. Hall: "Give us an exception."

The witness Glasburg was being examined as a witness of plaintiff in error when this colloquy occurred. The only requirement of the court, precedent to the introduc-

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tion of statements of the nature called for by the question, was that the interrogatory should be directed to a conversation with some particular person named; that is, either with Edholm or with Akin, or some other party named. It seems to us that this was but a reasonable requirement, and that counsel, by refusing a compliance therewith, did not place himself in such an attitude as that he could complain of the refusal of the court to permit an answer to an interrogatory so general in its nature as that propounded. If there had been a conversation of the nature of that sought to be elicited, it would be proper that the party with whom that conversation was held should be designated in the interrogatory, so as to afford a fair opportunity to make any proper objection which might lie thereto, because of the incompetency of the evidence founded upon a lack of privity between the plaintiff and the party with whom Glasburg might have had the conversation in question. The requirement was but a reasonable one, and the failure to comply with it affords no ground for criticism of the ruling of the court, much less does it justify any intimation of unfairness on the part of the presiding judge.

The above quotation we will supplement with a few excerpts from the bill of exceptions, illustrative not of any particular question which arose, but of the general course of procedure followed in the trial of this cause. Upon the cross-examination of the witness Akin as to a conversation had with Mr. Bell, to which we have heretofore referred, the witness was asked:

Didn't you tell him substantially just as I have given it to you?

The Court: Can you answer the question, Mr. Witness?

A. Why I can say as to what I told him or said to him.

Q. Well, did you say that to him? If you didn't, you can say so, can't you?

A. I might have told him——

Q. No, no; did you say that?

A. I can't answer that question unless you let me explain.

Mr. O'Connor: We ask that the witness be fined for contempt of court for not answering the question. We ask that the rules be enforced, and that he will have to answer. He can do it. He said so, or he did not say so.

After the refusal of the court to fine for contempt, as requested, the examination proceeded as follows:

Q. At that time didn't you state to Mr. Bell that you had completed this contract with Thompson and that you were to have twenty-five per cent of the profits?

The Court: Answer the question, if you can.

Counsel: Will your honor instruct him to confine his answer and not go outside?

The Court: Yes, I will instruct him to confine his answer; but not as to how he should answer, further than to answer the question as propounded by Mr. Hall.

A. That question I cannot answer unless I am allowed to explain.

Q. Well?

Mr. O'Connor: I expect that is not an answer to the question.

Mr. Howe: Don't you want him to explain?

Mr. Hall: I don't propose to allow him to throw in a lot of stuff unless you will agree that I shall cross-examine on it.

Mr. Howe: We will agree to nothing.

The Court: We will stop right here on this line of questions and go on to something else.

Mr. O'Connor: We take exception to the refusal of the court to compel the witness to answer that question, "yes" or "no."

This objection was overruled, and defendant excepted.

A little further on in the cross-examination of this same witness he was asked upon what book the bills payable and receivable of the firm of Edholm & Akin would be entered, and following this was this colloquy:

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A. Why, our eastern notes would be entered on the bills payable books; those are the only ones we kept track of.

Q. Your eastern notes?

A. Yes, sir.

Q. I am not asking you about your eastern notes, I am asking you upon what books those entries would be made. I am not asking you to go into the contents, I am expressly trying to keep you from doing it. I want you now just to answer the question. What is the name of the books upon which your bills payable and receivable would be entered?

A. Our eastern bills payable——

Mr. Hall: Never mind now. What is the name of the book? Don't go and slash that into me any more. You are trained too well. Give the name of the book. You know it.

A. Well, we called it the bills payable and bills receivable book.

The witness Farnsworth was asked as to his judgment of the amount of the stock in January, 1890, and answered that it was about forty thousand as he recollected it.

Mr. O'Connor: I move to strike that out as not responsive to the question, incompetent, irrelevant, and immaterial.

During the argument the following exception was taken:

Mr. O'Connor: They have the witnesses drilled here, and I make the charge deliberately.

Mr. Howe: I want that taken down by the reporter, now that the charge is made deliberately.

The Court: I ask that counsel on both sides abstain from these assertions which have no bearing on the question here.

Mr. O'Connor: The witnesses are trained to that, and I have the right to say so. Just the moment, like a parrot, when a word is mentioned they answer right out what they have no right to answer. I say the witnesses are

trained. While I don't charge Mr. Howe with training them, somebody has done it, and they are very apt scholars.

The Court: I don't think it is proper to say these witnesses are trained. This witness seems to me to be a very fair witness.

Mr. Hall: We desire to except to that.

Mr. O'Connor: I wish to note it down. It is certainly error on the part of the court to remark on any evidence.

In the cross-examination of Albert Edholm was the following:

Q. Didn't you know as a matter of fact that you could get the very best jeweler's trunk for \$35?

A. No, sir.

Q. You say that is not so?

A. I say I did not know that.

Q. Oh, you did not know that?

A. You asked me if I did not know that, and I said "no."

Q. Oh, yes; we will give you another chance to dodge it in another direction.

Like the trunk just inquired about, these excerpts are but samples of what occurred during the twenty-five days occupied in the trial of this case; but they serve fully to illustrate with what truth to life was given the examination of one witness in the trial of Bardell against Pickwick, any indorsement of the reflections of the reporter of that case, however, being expressly discarded. The portion of the celebrated trial alluded to is reported in the following language:

"'Now, Mr. Winkle,' said Mr. Skimpin, 'attend to me, if you please, sir, and let me recommend you for your own sake to bear in mind his Lordship's injunction to be careful. I believe you are a particular friend of Pickwick, the defendant, are you not?'

"'I have known Mr. Pickwick now, as well as I remember at this moment, nearly——'

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“‘Pray, Mr. Winkle, do not evade the question. Are you, or are you not, a particular friend of the defendant?’

“‘I was just about to say that——’

“‘Will you or will you not answer my question, sir? Come, sir,’ said Mr. Skimpin, ‘yes or no, if you please.’

“‘Yes, I am,’ replied Mr. Winkle.

“‘Yes, you are, and why could you not say that at once, sir? Perhaps you know the plaintiff, too; Eh, Mr. Winkle?’

“‘I don’t know her. I have seen her.’

“‘Oh, you don’t know her, but you have seen her? Now, have the goodness to tell the gentlemen of the jury what you mean by that, Mr. Winkle.’

“‘I mean that I am not intimate with her, but I have seen her when I went to call on Mr. Pickwick in Goswell street.’

“‘How often have you seen her?’

“‘How often?’

“‘Yes, Mr. Winkle, how often? I will repeat the question for you a dozen times if you require it, sir.’ And the learned gentleman, with a firm and steady frown, placed his hands on his hips and smiled suspiciously at the jury. On this question there arose the edifying browbeating customary on such points. First of all, Mr. Winkle said it was impossible for him to say how many times he had seen Mrs. Bardell. Then he was asked if he had seen her twenty times, to which he replied, ‘certainly, more than that.’ Then he was asked whether he had not seen her a hundred times; whether he could not swear that he had seen her fifty times; whether he did not know that he had seen her at least seventy-five times, and so forth. The satisfactory conclusion which was arrived at at last, being that he had better take care of himself, and mind what he was about. The witness having been by these means reduced to the requisite ebb of nervous perplexity, the examination was continued as follows:

“‘Pray, Mr. Winkle, do you remember calling on the defendant Pickwick at these apartments in the plaintiff’s house in Goswell street on one particular morning in the month of July last?’

“‘Yes, I do.’

“‘Were you accompanied on that occasion by a friend of the name of Tupman, and another of the name of Snodgrass?’

“‘Yes, I was.’

“‘Are they here?’

“‘Yes, they are,’ replied Mr. Winkle, looking very earnestly towards the spot where his friends were stationed.

“‘Pray, attend to me, Mr. Winkle, and never mind your friends,’ said Mr. Skimpin, with another expressive look at the jury. ‘They must tell their stories without any previous consultation with you, if none has yet taken place’—(another look at the jury).”

For our purpose this quotation is amply sufficient. The judgment of the district court is

**AFFIRMED.**

**JOHN A. WAKEFIELD, APPELLEE, V. WILLIAM LATEY  
ET AL., IMPEADED WITH W. B. MILLARD, APPEL-  
LANT.**

39	285
43	897
39	285
44	247

FILED FEBRUARY 7, 1894. No. 4602.

1. **Mechanics’ Liens: ACCOUNT: REGISTRATION.** The object of the mechanics’ lien statute, which requires a lien claimant to file in the office of the register of deeds “an account in writing of the items” of material for which he claims a lien against real estate, is to apprise persons dealing with it of the claims against the same.
2. ———: ———. Section 3, chapter 54, Compiled Statutes, 1893, mechanics’ lien law, requires a lien claimant to make oath to the “account in writing” of the items for which he claims a

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lien, but does not require him to state in such oath all the facts which he would be required to plead and prove in order to establish his lien by a decree of a court of equity.

3. The "account of items" and the oath or affidavit attached thereto should both be looked to and read as one instrument to determine whether a lien claimant has brought himself fairly within the provisions of the mechanics' lien law.
4. **Mechanics' Liens: STATEMENT OF CLAIM: CONSTRUCTION.** Whether a verified "account of items" filed for record shows on its face sufficient to entitle it to be asserted of record as a lien against the real estate of another, and made the basis of a suit in equity to foreclose such lien, is a question of law to be determined from the instrument itself.
5. ———: ———. Whether a lien claimant has performed such acts, and performed them under and in pursuance of such conditions and in such time and manner as to entitle him to a decree establishing his lien, are mixed questions of law and fact.
6. ———: **PROOF.** A lien claimant cannot prove his compliance with any of the requirements of the mechanics' lien law by the "lien," so called, itself, save the filing thereof and the oath thereto.
7. ———: **SINGLE LIEN AGAINST SEVERAL BUILDINGS.** A lumber merchant, in pursuance of a single contract with the owner of two separate lots, furnished him material for the erection of three houses thereon. *Held*, That the lumber merchant was entitled to enforce a single lien against all the houses and lots for the balance due him for material furnished by him under his contract with the owner.
8. ———: **ACCOUNT OF ITEMS: FAILURE TO STATE OWNER OF REALTY.** In a verified "account of items" of material filed, and for which a lien was claimed against certain real estate under the mechanics' lien law, neither in such account nor the affidavit attached thereto was it stated who was the owner of the real estate, nor that the contract for the material was made with the real estate owner or his agent. *Held*, That such omissions were not fatal to the lien.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The facts are stated in the opinion.

*Hall, McCulloch & English*, for appellant:

The affidavit did not conform to the statute. (*Hays v. Meroier*, 22 Neb., 661.)

A joint lien cannot be had, when, as in this case, the houses are separate and distinct. The statute is not complied with by filing a joint lien, and hence no lien attaches. (Phillips, *Mechanics' Liens*, sec. 376; *Kezartee v. Marks*, 15 Ore., 529; *Culver v. Elwell*, 73 Ill., 536; *Fitzpatrick v. Thomas*, 61 Mo., 512; *Chapin v. Perssee & Brooks Paper Works*, 30 Conn., 461; *Hill v. Braden*, 54 Ind., 72; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq., 150; *Hill v. Ryan*, 54 Ind., 118; *Goepp v. Gartiser*, 35 Pa. St., 130; *James v. Hambleton*, 42 Ill., 308; *Ballou v. Black*, 17 Neb., 395.)

*Montgomery, Charlton & Hall*, contra:

The contract for the erection of the buildings was entire. No separate account was kept or required as to any house, or any particular part of the lots. The lien therefore attached. (*Doolittle v. Plenz*, 16 Neb., 156.)

RAGAN, C.

John A. Wakefield brought suit in the district court of Douglas county to foreclose a lien against lots one and two in block six, Denise's addition to the city of Omaha, for material which he alleges he furnished to construct some dwelling houses on said lots. William Latey and William V. Benson were made defendants, as it is alleged the material was furnished to them, they owning the lots at the time, and W. B. Millard was made defendant, as he owned the lots when this suit was brought. The district court by its decree gave Wakefield a lien on the lots, and Millard brings the case here on appeal.

Counsel for appellant, for a reversal of this decree, make the following points:

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Wakefield v. Latey.

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1. That the affidavit attached to the "account of items," mechanic's lien, is insufficient. The affidavit is as follows:

"STATE OF NEBRASKA, }  
DOUGLAS COUNTY. } ss.

"John A. Wakefield, being first duly sworn, on his oath says that the foregoing itemized account of materials is a true and correct account of materials furnished by this affiant for the said — under a verbal contract for said materials for the erection of the houses upon said land as dwellings on the following described lots, piece, or parcel of land, viz.: Lots one and two, block six, Denise's addition to the city of Omaha; and this affiant further says that he has, and hereby claims, a lien on said premises for the full amount of his said account, to-wit, the sum of \$1,922.93, together with interest thereon at the rate of ten per cent per annum from the 17th day of September, A. D. 1887. And further affiant says not.

"JOHN A. WAKEFIELD."

It will be observed that the lien claimant in this affidavit does not state the name of the person with whom he contracted to furnish the material mentioned in the account, nor does he state the name of the real estate owner; and it is for these reasons that counsel claim the affidavit is insufficient. The "account of items," to which this affidavit is attached, is headed: "Omaha, Nebraska, January 20, 1888. John A. Wakefield, wholesale and retail lumber and building materials. Sold to Latey & Benson. Ten per cent interest charged after maturity." Then follows the dates and items and price of the material. Then the following: "Omaha, Nebraska, January 20, 1888. William Latey *et al.*, Latey & Benson, Esq., To John A. Wakefield, Dr. To merchandise for three houses, bills sold August 17, 1887, as per itemized bill attached."

The "account of items" and affidavit attached to the same should be both looked to and read as one instrument, and when this is done, it appears that in pursuance of a

verbal contract of June 17, 1887, Wakefield sold the material for which he claims a lien to Latey & Benson for the erection of the houses on the real estate described in the affidavit. We think this a sufficient compliance with the statute. It is true that to enable a material-man to have established, by decree of a court of equity, a lien against real estate for material furnished for an improvement thereon, he must plead and prove that he furnished material for the purposes of an improvement on said real estate; that he furnished such material in pursuance of a contract, express or implied, made with the real estate owner or his agent; that within four months of the date of the furnishing of the last item of such material, he made an account in writing of the items thereof, made oath thereto, and filed the same in the office of the register of deeds; but these are matters of pleading and evidence in a suit to establish the lien claimed.

Section 3, chapter 54, Compiled Statutes, 1893, provides: "Any person entitled to a lien under this chapter shall make an account in writing \* \* \* of the material furnished, \* \* \* and after making oath thereto, shall," etc. But this section does not require the lien claimant to state in such oath all the facts he would be required to plead in a suit to foreclose his alleged lien. The object, however, in requiring a lien claimant to file in the office of the register of deeds "an account of the items" of material for which he claims a lien against real estate, is to apprise persons dealing with it of the claims against the same; and this statute is complied with if it appear or is fairly inferable from the "account of items" and oath or affidavit thereto, when read together, that the claimant has brought himself within the provisions of the statute. Whether a verified "account of items" filed shows on its face sufficient facts to entitle it to be asserted of record as a lien against the owners of real estate, and a suit in equity to foreclose the lien claimed to be based thereon, is a juris-

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dictional question of law to be determined from an inspection of the instrument itself; but whether the lien claimant has performed such acts, and performed them under and in pursuance of such conditions and in such form and manner as to entitle him to a decree establishing his lien under the statute, are mixed questions of law and fact. The lien claimant cannot, however, prove his compliance with any requirement of the statute by the mechanic's lien (the verified account of items) itself, save the filing thereof and the making oath thereto. The first point made by appellant must be overruled.

2. The verified "account of items" was filed against Latey & Benson, and the evidence shows that the real estate, at the time they purchased the material and made the improvements, stood of record in the name of William Latey and William V. Benson, individuals composing the copartnership of Latey & Benson. Appellant's counsel insist that this state of facts made the firm of Latey & Benson subcontractors, and they have no lien because they did not make and file in the office of the register of deeds a sworn statement of the amount due them from their principals within sixty days, etc. The answer to this is that the evidence shows that the real estate was, at the time Latey & Benson made the contract with Wakefield for the material, and during the erection of the improvements for which the material was purchased, the property of the copartnership of Latey & Benson.

3. The verified "account of items" was filed January 20, 1888, and the last item claimed by Wakefield to have been furnished Latey & Benson under the contract is dated September 27, 1887. This item is made up of eight doors and 250 feet of "4370 lumber" (moulding). Counsel insist somewhat vehemently that there is in the record no competent evidence showing that the material called for by this item of September 22, 1887, was furnished by Wakefield to Latey & Benson under the contract in this case, and

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used by them in the erection of the improvements for which Wakefield claims a lien. Counsel are mistaken. There is in the record competent evidence justifying the finding of the trial court that the material mentioned in the item of September 22, 1887, was by Wakefield furnished to Latey & Benson under the contract between them, and there is positive evidence identifying some of the doors in the outhouses or sheds on the premises as the doors mentioned in the item. Counsel say, however, that the contract between Wakefield and Latey & Benson was for lumber for dwellings, and if these doors were used in the outhouses or sheds on the same premises on which the dwellings were erected, they cannot be included in the lien here. The contract was for material for the erection of three dwellings on the two lots, and the evidence shows all this material was delivered under the one contract. It would be a technical and narrow construction of the statute to say that under a contract for material for the construction of a dwelling a part of the lumber delivered under the contract, because used in building an outhouse or shed on the premises instead of the dwelling proper, could not be included in the "account of items." But if the doors be excluded from the 22d of September item, the evidence supports the finding that the moulding, at least, was delivered to Latey & Benson for, and used by them in, the dwelling proper. This disposes of appellant's third point.

4. Latey & Benson erected on the two lots three houses, designated in the evidence as Nos. 25, 26, and 27. These houses were all built at the same time. The material for all was furnished by Wakefield under one contract made with Latey & Benson. The houses were to be alike, and the material for each was to be the same. No separate account of the material furnished by Wakefield under his contract for their erection was kept, and such extra material as was used in the finishing of all three was furnished by Wakefield and charged to the account of Latey & Benson under their

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contract for material for the three houses. Counsel for appellant say: "A joint lien cannot be had when, as in this case, the houses are separate and distinct. The statute is not complied with by filing a joint lien, and hence no lien attaches." In *Doolittle v. Plenz*, 16 Neb., 153, it is said: "Where A agreed to erect and did erect three houses for B, one upon each of three adjoining lots, for an entire sum, held, that a mechanic's lien attached to all the lots and the buildings thereon."

5. It appears from the evidence that Latey & Benson, on November 3, 1887, paid Wakefield \$2,000, which sum Wakefield gave Latey & Benson credit for on an old account they owed him. Appellant insists that this \$2,000 was money he paid to Latey & Benson as purchase price for the real estate in controversy here, and that Wakefield should be compelled to credit his claim here against Latey & Benson with that sum. We cannot say the trial court was wrong in refusing to do this. The evidence shows that at the time Wakefield received the \$2,000 from Latey & Benson, they owed him large sums on old accounts and they gave him no directions and made no requests as to the account on which it should be applied. "Money paid by a debtor, without direction as to its application, may be applied by the creditor as he pleases." When appellant purchased these lots from Latey & Benson, the lien in suit was of record; and if he chose to pay over the purchase price and assume the risks of defeating the lien, he has no one to blame but himself and certainly is in no position to ask a court of equity to compel another to bear a loss he might have avoided by the exercise of a little foresight and business sagacity.

The decree appealed from is correct and in all things

**AFFIRMED.**

AMES C. PENNOCK, APPELLANT, V. DOUGLAS COUNTY  
ET AL., APPELLEES.

FILED FEBRUARY 7, 1894. No. 5124.

89	293
89	305
30	293
42	400

**Taxation: SALE OF LAND NOT SUBJECT TO ASSESSMENT: RECOVERY OF PURCHASE MONEY: CITIES.** In the absence of an express statutory mandate, a city of the metropolitan class cannot be compelled, either at law or in equity, to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer, for the purpose of collecting a special assessment or tax levied against such real estate by said city and for which special assessment or tax said real estate was not liable. The rule *caveat emptor* applies with full force to such a purchaser.

APPEAL from the district court of Douglas county  
Heard below before WAKELEY, J.

*Henry W. Pennock*, for appellant.

*W. J. Connell* and *A. J. Poppleton*, *contra*.

See opinion for authorities cited.

RAGAN, C.

Ames C. Pennock brought this suit in the district court of Douglas county against the city of Omaha, the county of Douglas, and John Rush, the treasurer of Douglas county. The county interposed a demurrer to Pennock's petition on the ground, generally, that it did not state facts sufficient to constitute a cause of action, and, specially, that it appeared from Pennock's petition that the claim sued for therein had been by him presented to the board of supervisors of Douglas county and by them rejected, and that he had not prosecuted an appeal from the order of said supervisors rejecting said claim. The city of Omaha also demurred to Pennock's petition on the ground that the

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same did not state a cause of action. There was no appearance by or service upon Rush. The district court sustained the demurrers and dismissed Pennock's case, and he comes here on appeal. His counsel thus states the facts in this case:

"The petition alleges for first cause of action that in the year 1883 the city council of the city of Omaha created, by ordinance, paving district No. 6, comprising a portion of St. Mary's avenue in said city; that in the year 1884 said city council passed an ordinance providing for the curbing and guttering of said street in said paving district and levied a tax upon the abutting property to pay for the same; that in the same year said city council passed an ordinance providing for the paving of said avenue in said paving district and levying a paving tax upon the abutting property to pay for the same; that lot eight in block two, in Kountze & Ruth's addition to the city of Omaha, was levied upon for said purpose, and the city treasurer was directed to collect said special assessments as other taxes; that in September, 1885, said city treasurer certified to the county treasurer of Douglas county the amount of said special assessments which were then due and delinquent upon said lot, and said county treasurer, after advertising the same in the manner provided by law, sold said lot to the plaintiff at private tax sale on the 28th day of December, 1885; that the plaintiff received of said treasurer a certificate of tax sale in the usual form; that the plaintiff paid to the county treasurer the full amount of said special assessments and interest, amounting to \$45.98.

"Some time after said tax sale to the plaintiff, the owner of said lot, with other adjacent property holders, applied to the city council by written petition for relief against said special assessments, on the ground that the same were illegal and void; that said council refused to grant the relief asked; that on the —— day of September, 1887, and

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more than three months before the time of redemption had expired, the plaintiff served the notice required by section 123 of the revenue law for the taking out of a tax deed; that after serving of said notice and before two years from tax sale had expired, the owner of said lot applied to the district court of Douglas county for a perpetual injunction, restraining the collection of said special assessments and any further proceedings under said sale; also praying that said assessments be adjudged illegal and void and no lien upon said lot. On the 20th day of December, 1888, final decree was rendered in said cause granting the request of said plaintiff and perpetually enjoining plaintiff herein from enforcing his tax sale against said property, and declaring that said special assessments were illegal and void and no lien upon said lot; that no appeal has ever been taken from said decree and the same is in full force and effect and that plaintiff's consideration at said tax sale has wholly failed; that afterwards the plaintiff applied to the county commissioners of Douglas county for repayment of the money expended at said sale, which was by said commissioners refused; that afterwards the plaintiff applied to the city council of the city of Omaha likewise for a reimbursement of the money so expended at said tax sale, which was by said city council refused; that plaintiff had used due care and diligence in the purchase of said lot for taxes, and had no means of knowing or reason for suspecting that said lot was not legally and properly assessed for said improvements, and that, through the representations of the city and its officers, he had been induced to purchase at said tax sale; that by reason of the illegal acts of the city in the premises, the consideration for said sale had entirely failed; that the city council has authority, under a special clause of the statute, to make a supplemental assessment and levy upon the property abutting on St. Mary's avenue, to correct any error, omission, or mistake in the first assessment or levy, and that said city may thus fully reimburse itself in the premises.

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"Second, third, and fourth causes of action contain similar allegations with reference to adjacent lots bought by the plaintiff for the same special assessments at the same date and under the same conditions.

"Prayer: (1) That the county of Douglas be required to refund to the plaintiff the amount so paid at said void tax sale with interest; (2) that in case said county be held not liable, that John Rush, the then county treasurer of said county, who made said illegal sales, be required to pay said amount with interest; (3) that in case neither the county of Douglas nor John Rush be held liable, the city of Omaha be adjudged to be liable to the plaintiff as for money had and received from the plaintiff; that, in that case, the city be adjudged to pay to the plaintiff the amount so paid by the plaintiff, with interest at the rate of seven per cent per annum, and for such other relief as may be in accordance with equity and justice."

If appellant's claim is one for which Douglas county was liable, then, to entitle him to recover against the county he should have filed such claim with its county clerk, had it passed upon by the county board of supervisors, or commissioners, and appealed from their decision, if the same was unsatisfactory, to the district court. In no other manner could the district court acquire jurisdiction of a suit against the county, founded on such a claim as the one sued on here by the appellant. (Sec. 37, ch. 18, Comp. Stats., 1893; *Brown v. Commissioners of Otoe County*, 6 Neb., 111; *State v. Commissioners of Buffalo County*, 6 Neb., 454; *Commissioners of Dixon County v. Barnes*, 13 Neb., 294; *Richardson County v. Hull*, 24 Neb., 536.) Appellant alleged that he duly filed his claim against Douglas county and that it was rejected by the supervisors, or county commissioners thereof; but it does not appear from the record before us that appellant has ever appealed from the order rejecting his claim, much less that the present suit is a prosecution of such an appeal. The judgment of

the district court, then, dismissing appellant's suit against Douglas county, was right. It may be that Douglas county would have been liable for appellant's claim had he pursued the remedies provided by the statute. (Sec. 131, ch. 77, Comp. Stats., 1893; *Richardson County v. Hull*, 24 Neb., 536; *Roberts v. Adams County*, 18 Neb., 471; *Wilson v. Butler County*, 26 Neb., 676.) But that question is not before us and we express no opinion on the point.

The question presented by this appeal is: In the absence of an express statutory mandate, can a city of the metropolitan class be compelled to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable? The learned counsel for appellant contends that the rule *caveat emptor* does not apply to such a purchaser, and in support of this contention, and that the question stated above should be answered in the affirmative, has furnished us an able and exhaustive brief and argument in which he has cited many authorities. We have carefully examined all the cases cited by him, and it is not to be denied that the contention of counsel is supported by the decisions of courts whose opinions are entitled to much weight.

The rule contended for by appellant seems to be the doctrine of the supreme court of Iowa. In *Corbin v. City of Davenport*, 9 Ia., 239, it is said: "The purchaser at an invalid sale of property by a city for taxes may recover of the city the amount of purchase money paid and interest." It does not appear from the opinion that it was predicated upon a statute making cities liable in such cases. Such, also, seems to be the rule in Wisconsin. In *Norton v. Supervisors*, 13 Wis., 684, it is said: "Where a tax sale is void the county is liable to the holder of certificates issued on such sale for the amount paid with interest.

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\* \* \* The statute makes it the duty of the treasurer to refund the money in such case on demand to the purchaser or his assigns; but the liability of the county does not depend upon this statute, and whatever remedy it gives is cumulative to the right of the action for money had and received." This case was cited with approval in *Van Cott v. Board of Supervisors*, 18 Wis., 259.

In *Chapman v. City of Brooklyn*, 40 N. Y., 372, the city of Brooklyn caused an assessment to be levied upon certain lots to pay the expense of grading and paving a certain avenue. The admitted benefits of this improvement to the two lots were assessed against parties who were not the owners of them. By the law in force in such cases, judgment for the amount of the assessment was rendered against the persons so assessed; executions issued on such judgment, and returned unsatisfied. The lots were then put up for sale by the street commissioner, and sold to a purchaser, who paid over the amount of the bid, and received the certificate of sale. The money was transmitted by the street commissioner to the city treasurer. An action was then brought against the city by the assignee of this certificate to recover back the money paid, on the ground "that the assessment proceedings were absolutely void for want of jurisdiction, the assessment not having been made against the owner of the lots." The court held that the assessment was void because not made against the owner of the lots, and, by a divided court, "that the plaintiff could recover on the ground of an entire failure of the consideration."

In *Phillips v. Mayor and Council of City of Hudson*, 31 N. J. Law, 143, the court said: "Where there was a sale [of real estate] to pay for an improvement in the city of Hudson, and a declaration of sale delivered in pursuance of a void ordinance, held, that the purchase money could be recovered back in an action of assumpsit" against the city. This case was also decided by a divided court.

The foregoing are all the authorities cited by counsel for the appellant which can be said to be squarely in point and support his views. Counsel, however, refers us to the following: *Pettit v. Black*, 8 Neb., 52, *Read v. Merriam*, 15 Neb., 323, and *Merriam v. Hemple*, 17 Neb., 345, as authority for the doctrine for which he argues. These cases, however, do not support appellant's contention. In each of these cases, while the tax deeds which the purchaser obtained at the tax sale were wholly void, the taxes for which the property was sold were valid liens on the property, and furthermore, the decisions in these cases were based on a statute. Counsel also cites us to *Wilson v. Butler County*, 26 Neb., 676; but this was a suit by Wilson against the county, and the opinion is predicated on a statute. Another Nebraska case cited by counsel is *Clark v. Board of County Commissioners of Saline County*, 9 Neb., 516. In that case Saline county conveyed a tract of land to one Hunt and paid him \$500 in money, in consideration of which Hunt agreed to build a bridge across the Blue river. Hunt assigned his contract to Clark and conveyed him the land. Clark built the bridge and the county accepted it. The title to the lands having failed, Clark sued the county for the value of the bridge, and the court held that he was entitled to recover. But there is a wide distinction between the legal status of a purchaser of property sold at a tax sale and that of one who builds an improvement for a county and receives land or other property in payment for such improvement, the title to which fails. Appellant's case is not within the principles of the case just cited.

*Pimental v. City of San Francisco*, 21 Cal., 352, *Taylor v. People*, 66 Ill., 322, *Louisiana v. Wood*, 102 U. S., 294, and *Chapman v. County of Douglas*, 107 U. S., 48, also cited by appellant's counsel, are analogous in principle to *Clark v. Board of County Commissioners of Saline County*, *supra*, and need not be further noticed.

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As opposed to the rule contended for by appellant's counsel are *Lynde v. Inhabitants of Melrose*, 92 Mass., 49, where it is said: "If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase. \* \* \* No precedent for maintaining such a suit is found, and the plaintiff's counsel rests his argument solely upon the ground that the defendants have received the amount of the tax without consideration. \* \* \* There is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him and the claim of the purchaser under a collector's deed whose title proves defective. \* \* \* The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed as the town has. He buys the title without warranty except such covenants as he takes from the collector, and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent or with any contract, expressed or implied, to reimburse him if his bargain proves a losing one."

Such is the rule in the state of Indiana. In *Churchman v. City of Indianapolis*, 110 Ind., 259, it is said: "Money voluntarily paid on a demand in the nature of a tax—and a street improvement assessment is such—cannot be recovered back in the absence of an express statutory provision authorizing such a recovery. The doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any other analogous class of sales. A recital in a deed executed by a city treasurer upon the sale of lands in satisfaction of an assessment for a street improvement that 'it appearing from the records of the com-

mon council of said city, in the city clerk's office, that the aforesaid lands were legally liable for such assessment,' is not a representation of fact upon which the grantee had a right to rely." To the same effect see *State v. Casteel*, 110 Ind., 174; *Worley v. Town of Cicero*, 110 Ind., 208; *Board of Commissioners v. Armstrong*, 91 Ind., 528; and the *City of Logansport v. Humphrey*, 84 Ind., 467, where it is said: "The purchaser at a city tax sale assumes all risks, and if the sale proves invalid, has no remedy against the municipality."

This also seems to be the rule at present in New Jersey. In *Casselberry v. Piscataway*, 43 N. J. Law, 353, it is said: "A municipality is not bound to refund the purchase money received on a tax sale merely because there has been illegality in the proceedings which defeats the title of the purchaser, \* \* \* the rule of law applicable to such a case is that the municipality is under no obligation to refund the purchase money, because the tax title fails. The purchaser is a volunteer and buys at his own risk."

This also seems to be the doctrine in California. In *Loomis v. Los Angeles County*, 59 Cal., 456, it is said: "In an action against a county to recover purchase money paid by the plaintiff at a void tax sale there is no rule of law authorizing plaintiff to recover." (See also *Harper v. Rowe*, 53 Cal., 233.)

This also seems to be the rule in New York, notwithstanding the case of *Chapman v. City of Brooklyn*, *supra*. (See *Swift v. City of Poughkeepsie*, 37 N. Y., 511; *Phelps v. Mayor of New York City*, 112 N. Y., 216.)

Such is the rule in Kansas. In *Sullivan v. Davis*, 29 Kan., 28, it is said: "The rule *caveat emptor* is, except as limited or qualified by express provisions of statute, universally applicable to all purchasers at tax sales." (See also *Board of Commissioners v. Geis*, 22 Kan., 381; *Sapp v. Commissioners of Brown County*, 20 Kan., 243; *Commissioners of Wabaunsee County v. Walker*, 8 Kan., 431; *Phil-*

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*lips v. Board of Commissioners of Jefferson County*, 5 Kan., 412.)

In *San Francisco & N. R. Co. v. Dinwiddie*, 13 Fed. Rep., 789, it is said: "An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property, which violates the provisions of the fourteenth amendment to the constitution of the United States, is void. A payment under it is not a payment under duress, but is voluntary and cannot be recovered."

In Cooley, Taxation [1st ed.], 328, it is said: "A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights or tend in any contingency to defeat them. A tax purchaser consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it; but the tax purchaser is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed; and this presumption stands for evidence in many cases, but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed because one is shown to have been taken that the officer performed his duty in taking that which should have preceded it."

In Desty, Taxation, p. 850, it is said: "Except as limited and qualified by express statutory provisions, the rule [*caveat emptor*] applies to all purchasers at tax sales; and if the public has nothing to sell, the purchaser gets nothing. Purchasers are bound to know, at their peril, that the supposed delinquent is in fact delinquent,—that he has been lawfully assessed, and has failed to make payment.

\* \* \* The purchaser at a municipal sale for taxes buys at his own risk, and at his peril investigates the proceedings. A county does not guaranty tax titles except as the statute may provide, and cannot refund money upon the failure of such titles."

We are urged by counsel for appellant to hold the city of Omaha liable in this case upon moral grounds, but we cannot do so. The city did not ask appellant to purchase at its tax sales. He was a volunteer, with all that that term implies. He bought without warrant or covenant of any kind and bid what he considered the venture worth; and under these circumstances and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title. (Rawle, Covenants for Title, sec. 321, and cases there cited.) In this case appellant knew when he made the purchase that in case of redemption he would receive a return on his investment unusually large. If the owners of the property failed to redeem the same, he could, under the statute, foreclose his lien and obtain title to valuable property for a very small part of its actual worth. Appellant claims that he should be given all these advantages for unusual profits, but at the same time he should be fully indemnified against any risk of loss. In no other line of business, under no other circumstances, would such a claim be made. In the interest of the public revenue and as an inducement to buy at tax sales, our law presents tempting offers to the speculator; but until the legislature

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Merrill v. City of Omaha.

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shall so expressly declare, the courts will not place the responsibility upon cities of refunding money paid by purchasers for property at sales made thereof for taxes. (*Budge v. City of Grand Forks*, 47 N. W. Rep. [N. Dak.], 390.)

A consideration of the authorities reviewed above leads us to the conclusion that the rule *caveat emptor* applies with full force to purchasers of property at tax sales, and constrains us to the conclusion that in the absence of a statute therefor, no municipality can be compelled, either at law or in equity, to refund money which it has received from the sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor. The decree appealed from must be

AFFIRMED.

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H. A. MERRILL, APPELLANT, V. CITY OF OMAHA,  
APPELLEE.

FILED FEBRUARY 7, 1894. No. 5123.

**Taxation: SALE OF LAND NOT SUBJECT TO ASSESSMENT: RECOVERY OF PURCHASE MONEY FROM CITY.** The law applicable to this case was settled by this court at this term in *Pennock v. Douglas County*, 39 Neb., 293, and on the authority of that case the decree appealed from in this case is affirmed.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*Henry W. Pennock*, for appellant.

*W. J. Connell* and *A. J. Poppleton*, contra.

RAGAN, C.

H. A. Merrill brought this suit in the district court of Douglas county against the city of Omaha to recover certain city taxes which he had paid upon real estate. The

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tax levy was void because the property was not taxable. At the time Merrill paid the taxes he was the owner of tax sale certificates against the property, which he had received from the treasurer of Douglas county at a sale of property for taxes for a prior year. . The district court sustained a demurrer to Merrill's petition filed thereto, on the ground that it did not state facts sufficient to constitute a cause of action, and dismissed Merrill's case, and he brings it here on appeal.

The law of this case was settled by this court at this term in *Pennock v. Douglas County*, 39 Neb., 293, and on the authority of that case the decree of the district court in the case at bar is

AFFIRMED.

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CITY OF LINCOLN V. HENSON CALVERT.

FILED FEBRUARY 7, 1894. No. 5622.

**1. Municipal Corporations: DEFECTIVE STREETS: REPAIRS.**

The duty ordinarily resting upon a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs or improvements.

- 2. ———: ———: ———.** But in such case the city is free from liability only for such obstructions or unsafe conditions as are reasonably necessary for the purpose of performing the work and such as are maintained only for the time reasonably required for making such improvements.

- 3. ———: ———: ———: NEGLIGENCE.** And where a street is rendered unsafe for travel in the ordinary modes by improvements in progress thereon the city must exercise reasonable care to protect the public from the consequences of such unsafe condition.

- 4. ———: ———: NEGLIGENCE: NOTICE: LIABILITY FOR INJURIES.** While a city is liable only for injuries resulting from defects

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brought to its notice or existing under such circumstances that ignorance of the defect amounts in itself to negligence, still, when the defect is caused by the direct act, order, or authority of the city, notice is necessarily implied.

5. ———: ———: ———: INSTRUCTIONS. In an action for injuries sustained from the defective condition of a street caused by grading operations preparatory to paving, the court instructed the jury that it was the duty of the city to use reasonable care in keeping the sidewalk in a reasonably safe condition, and if the city failed so to do and maintained a dangerous condition for a considerable time it would be liable. *Held*, Erroneous for not stating the rule fixing the city's duty and liability as defined in the first, second, and third of the above paragraphs, and in charging the city for an unsafe condition maintained for a considerable time instead of an unreasonable time.
6. Review. The evidence examined, and *held* to conform to the allegations of the petition and to be sufficient to sustain the verdict.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*N. C. Abbott, City Attorney, and Abbott, Selleck & Lane,*  
for plaintiff in error.

*Leese & Stewart, contra.*

IRVINE, C.

The defendant in error recovered a judgment of \$2,000 and costs against the plaintiff in error because of injuries sustained by defendant in error through a fall occasioned, as he alleged, by the defective condition of a street.

1. The first assignment of error to be noticed is that there was a variance between the allegations of the petition and the proof. The allegations of the petition in regard to the manner in which the accident occurred are briefly as follows: That on the west side of Tenth street between S and T streets, and extending beyond T street, there is a sidewalk; that while plaintiff was walking along and upon said sidewalk at the southwest corner of Tenth and T

streets he fell down and into an excavation or cut negligently, willfully, and knowingly made and left by the defendant in the sidewalk at said point and place, causing plaintiff to fall across and upon a large curb or other stone, by defendant negligently, purposely, and willfully left lying at that point and place against the bank of said cut or excavation; that said cut or excavation was knowingly and negligently made and left so as to be dangerous and unsafe to persons walking along said sidewalk a long time prior to the injury, and said sidewalk was knowingly, willfully, and negligently permitted to remain in said condition, and said stone knowingly, willfully, and negligently permitted to remain in a dangerous and unsafe condition to persons walking along said sidewalk; that the place where said sidewalk was defective and dangerous was about the edge and beginning of the crossing of Tenth and T streets, and that the said cut and excavation was in T street, occupying and filling all the space in T street at said point.

The proof offered on the part of the plaintiff was that Tenth street extended north and south, T street crossing it at right angles. Both streets at and near their intersection had been graded, or were in process of grading, preparatory to paving, a cut being made at the intersection estimated by different witnesses at from three to seven feet in depth. A portion of the sidewalk along T street at the southwest corner of the intersection had been removed, and along the sidewalk line a pathway had been cut or worn, inclining from the original surface of the ground towards the bottom of the cut in T street. Curb-stones had been thrown along T street, but had not been placed in position. One of these, of considerable size, was left lying across this pathway. Its precise position seems to have been described by witnesses by some means of illustration probably perfectly clear to the eye but far from appearing clear upon the record. It would seem, however, that this stone lay at or near the bottom of the incline and in a diagonal direction

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across the pathway. Upon the day of the accident Calvert, who lived north of T street, walked south along Tenth street to the place of his labor, when rain setting in, work was stopped and he started to return home by the same route. When he reached the place where the sidewalk had been removed he found that the rain had rendered the inclining pathway muddy and slippery. He took a long step or leap to reach the stone, alighted upon it, but the stone itself being wet, he lost his footing and fell, striking the stone in his fall and sustaining an injury.

The city construes the petition as charging that Calvert fell from the brink of the excavation into it and upon the stone and claims that the proof does not conform to those allegations. We think this construction of the petition too narrow and unwarranted. That might be the inference from some of the language of the petition, but when all the allegations in regard to the condition of the street and the manner of the injury are taken together, we think the proof fairly conforms thereto. The language of the petition may be open to criticism for want of precision, but the pleader was not required to state his evidence, and a more precise statement of the facts would probably be difficult. The language used was sufficient to apprise the city with sufficient certainty of the facts claimed to exist.

2. We shall next consider the assignment that the verdict is not sustained by the evidence, and in order to do so it will be necessary to first state the principles of law governing the case, a statement which is also necessitated for the purpose of examining the instructions. It is the established law of this state that a city is required to use all reasonable care to keep its sidewalks and streets in a reasonably safe condition for traveling in the ordinary modes of travel, and for failure to do so it is liable for injuries sustained by one not guilty of contributory negligence. (*City of Lincoln v. Smith*, 28 Neb., 762, and cases there cited.) But the city is liable only for its negligence, and

ordinarily it must have notice of the defect complained of before it can be charged; but notice will be presumed where the facts are such that ignorance of the defect can only arise from a failure to exercise reasonable official care. (*City of Lincoln v. Smith, supra.*) Where, however, the street has been rendered unsafe by the direct act, order, or authority of the city itself, the city necessarily has notice and is liable. (2 Dillon, Municipal Corporations, sec. 1024, and cases cited.) But where a city is charged with the care of streets and the duty of improving them, the duty of keeping them in a reasonably safe condition for travel is remitted during the time occupied in making repairs or improvements. (*James v. City of San Francisco*, 6 Cal., 528; *Williams v. Tripp*, 11 R. I., 447.) In order, however, that the city should be protected from liability upon this ground it must exercise reasonable care to protect the public from the consequences of the unsafe condition of the street. (*City of Covington v. Bryant*, 7 Bush [Ky.], 248.) Therefore, an impassable condition of the street requires that the city should erect guards or barricades to keep the public off. (*City of Omaha v. Randolph*, 30 Neb., 699.) And in any event the city is only protected from liability for such obstructions or unsafe conditions as are reasonably necessary for the purpose of performing the work, and such as are maintained only for the time reasonably required for making such improvements. (*Williams v. Tripp, supra.*)

Applying these rules to the evidence, we find evidence in the record tending to show that the grading had been practically completed for about two months. The curbstones had been delivered about ten days before the accident, and this particular stone had been lying in this spot for that period. There is slight evidence upon the part of the city tending to show that a rainy season had delayed the progress of the work, but such evidence is of a very unsatisfactory character. In order to determine the city's liability these were facts which the jury might properly

consider in determining whether or not by an unreasonable delay the city was guilty of negligence in maintaining the street in such condition. There is also much evidence in regard to the character of the inclined pathway, the degree of its slope, and the position of the stone. For the reason that the witnesses indicated these facts by signs and illustrations, we cannot review this evidence as to its sufficiency, but must presume that there was sufficient evidence to justify the jury in finding that an unreasonable and dangerous crossing had been provided. Upon either of these points the verdict might properly be predicated.

It is urged that the proof shows that the plaintiff was guilty of contributory negligence in attempting to cross. It does appear that a short time before he had passed the spot, going in an opposite direction, and he therefore knew the character of the crossing. It also appears that there were other routes which he might have taken; but it is inferable in this connection that these other routes were less convenient and possibly as unsafe as the one he chose. We cannot say, as a matter of law, that a person knowing that a sidewalk is defective has no right to attempt to travel over it. It has been frequently stated by this court that inferences of negligence or contributory negligence upon a state of facts where reasonable minds might draw different conclusions are exclusively for the jury. It should be unnecessary to repeat that rule. In such a case as this it is for the jury to say, under all the circumstances, whether or not the plaintiff should attempt to pass, and whether or not, if warranted in attempting to do so, he exercised proper care in making the attempt.

3. Many errors are assigned in the giving and refusing of instructions. It will not be necessary to notice all. Some of the instructions asked by the defendant were properly refused if for no other reason because they required as an element necessary to render the city liable that the jury should find that the city had willfully placed

and left the street in a dangerous condition. While the fact that the condition of the street was due to the direct act of the city became important as affecting the question of notice, it would be improper to give the jury any instructions from which it might infer that the city officials must have deliberately placed the street in such condition for the purpose of making it dangerous. Other instructions were properly refused because their substance was given by the court of its own motion.

It is urged that the third instruction given by the court is erroneous in not requiring the jury to find, as a condition necessary to render the city liable, that the city had notice of the defect. A portion of this instruction is as follows: The plaintiff must establish "that said cut and obstruction in said sidewalk were made by defendant and negligently left and allowed to remain by defendant in a condition dangerous and unsafe to persons walking along said street and exercising ordinary and reasonable care therein." This portion of the instruction required that the jury should find, as a condition necessary to establish plaintiff's case, that the cut and obstruction were made by defendant. As already stated, where the defect is caused by the direct act of the defendant, notice is inferred from that fact; and the instruction was correct under the evidence of the case, and more favorable to the city than if it had simply directed the jury in general terms that notice was necessary.

The sixth instruction was as follows:

"If you find from the evidence that the defendant city failed to use reasonable care in keeping its sidewalk on Tenth and T streets in a reasonably safe condition for foot travel, and if you find from the evidence that defendant left and permitted to be left for a considerable length of time a cut in T street where the sidewalk on Tenth street crossed T street, and left or permitted to be left in said crossing a curb-stone for a considerable time, slantingly upon the bank of the cut in the line of the sidewalk travel,

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and if you find from the evidence that said cut, if any, and stone, if any, rendered said sidewalk unsafe and dangerous to foot-travelers, and if you find from the evidence that plaintiff, while walking over and upon said sidewalk, without negligence or want of care upon his part, was injured by reason of said cut and curb-stone, if any, and thereby sustained damages, then defendant is liable therefor."

This instruction was erroneous. It correctly charged the jury as to the general duty of the city to keep its sidewalks in a reasonably safe condition for foot travel, but omitted altogether to direct the jury that the duties imposed upon a city in regard to a street undergoing improvements are different from those generally imposed. The true rule in such cases has been stated above. In the next place the jury was told in effect that if the city permitted to be left for a "considerable length of time" a cut in the street, and permitted to be left for a "considerable time" a curb-stone in the crossing, and that the cut and stone rendered the sidewalk unsafe and dangerous, and that plaintiff was thereby injured without negligence upon his own part, the defendant was liable. This practically took the question of negligence away from the jury. The phrase, "a considerable length of time," is indefinite and proposed no proper test to the jury. The periods of ten days and two months might be, in the estimation of the jury, "a considerable length of time," and the condition of the cut and stone was undoubtedly by the jury found to be dangerous. But the city had a right, in grading and paving the street, to create a condition which would be dangerous, provided it was reasonably necessary to do so in order to make the improvements, and provided further that the dangerous condition was not maintained for an unreasonable time. It might reasonably require a much longer time than was shown to exist in this instance to complete the improvements. Whether the time occupied was reasonable or not was for the jury to determine, and the

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test was the reasonableness of the time occupied, and not whether or not a "considerable length of time" was occupied. No other instruction was given upon this subject.

It will not be necessary to review the other instructions. They were substantially correct, and enough has been said to guide the trial court in the course of further proceedings.

REVERSED AND REMANDED.

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SOREN JONASEN V. GEORGE W. KENNEDY.

39	313
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40	371

FILED FEBRUARY 7, 1894. No. 5153.

**1. Malicious Prosecution: DEFENSE: ADVICE OF COUNSEL.**

In an action for malicious prosecution, in order that reliance upon the advice of counsel may operate as a defense, it must be made to appear that before instituting the prosecution the defendant had made a full, fair, and true statement to such counsel of all the information in his possession, and that he instituted the prosecution in good faith, relying upon such advice.

2. ———: ———: ———. The evidence to establish such defense must show what facts, information, and circumstances were communicated to counsel, and it is not competent for a witness to testify that he related all the circumstances without stating what they were; the inference as to what circumstances would constitute a proper disclosure being for the jury and not for the witness to draw.

3. ———: ———: ———. It is not error for the court to refuse an instruction submitting such a defense to the jury where there is no competent evidence tending to show that a true and full statement had been made to counsel.

4. ———: INSTRUCTIONS: EVIDENCE. Where the criminal charge made by defendant against plaintiff was for the larceny of a ring, and the evidence tended to show that a ring, which defendant believed to be the one stolen, was found in plaintiff's possession, but there were no facts or circumstances other than the possession of the ring pointing towards plaintiff's guilt, and it was not shown how long the theft had occurred before the ring

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was found in plaintiff's possession, it was not error to charge the jury that the mere fact that the defendant had lost a ring by theft, and that he suspected or believed that the ring found in plaintiff's possession was the ring which he had lost, was not of itself sufficient to constitute probable cause for the arrest of the plaintiff.

5. ———: PROBABLE CAUSE: INSTRUCTIONS. It is not error to charge the jury that probable cause is a reasonable ground for suspicion supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious man in the belief that the person accused is guilty of the crime with which he is charged, where, by other instructions, the jury is told what facts under the evidence in the case, if found by the jury, would constitute probable cause or want thereof.
6. ———: INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment.
7. ———: ———. It is not error to refuse an instruction confining the jury, in determining whether or not there was probable cause, to the information in defendant's possession when he instituted the prosecution, and excluding facts subsequently coming to his notice, when there was no evidence tending to show that any of the facts relied upon to establish a want of probable cause were not known when the prosecution was instituted.
8. WITNESSES: OBJECTIONS: REVIEW. It is not prejudicially erroneous to sustain an objection to a question proper in itself when in the course of the examination of the same witness he is permitted to answer questions substantially similar in their nature.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*Hall, McCulloch & English*, for plaintiff in error.

*George S. Smith and J. S. Miller*, contra.

IRVINE, C.

Kennedy recovered a judgment against Jonasen for \$500 and costs for malicious prosecution. This judgment Jonasen seeks to reverse. The action grew out of the follow-

ing state of facts: Jonasen was a jeweler in Omaha. At some time, not definitely appearing from the evidence, a diamond ring had been stolen from the top of a show-case in Jonasen's place of business, where it lay with other jewelry which he was showing to some one, ostensibly a customer. He reported the loss of this ring to the police authorities. The 16th of November, 1889, Kennedy visited two or three jewelry stores in Omaha, seeking to have some jewels reset. His testimony tends to show that his business consisted in traveling over the country selling jewels, especially diamonds, generally to individual purchasers, but sometimes to dealers. One of the jewelers whom he visited reported his actions to the police. Two officers went to the store of Mr. Van Cott, which had been one of the places visited, and while they were making inquiries of Van Cott in regard to the transactions reported to them, Kennedy entered, and, overhearing a portion of the conversation, stated to the officers that he was probably the man they were inquiring about. At their request he accompanied them to the police station. Jonasen was sent for. A number of diamonds and a quantity of jewelry were found on Kennedy's person. They were placed upon a table, and when Jonasen entered, he identified a particular ring as that which had been stolen from him. The diamond in this ring had a flaw in it, described by the witnesses as a "small nick." This was called to Jonasen's attention, he stating that his diamond was perfect. Scales were brought and the diamond weighed. The scales showed that it weighed less than Jonasen's. As to the amount of difference there is a conflict in the evidence. The diamond was subsequently weighed upon other scales, all disclosing a weight less than that of Jonasen's diamond. A complaint was sworn to by Jonasen charging Kennedy with the larceny of his ring, and Kennedy was arrested and imprisoned for several hours, when he was released on bail. When the time came for a preliminary examination,

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Jonasen refused to testify positively that the ring found in Kennedy's possession was the one which had been stolen from him. The prosecuting officer then dismissed the case. Jonasen testifies that Kennedy was not the man to whom he was showing the jewelry at the time the ring was stolen. Two witnesses, men engaged in business in Omaha, testified that they called at the police station and, before the complaint was made, assured Jonasen that they had known Kennedy for a number of years; that they had reason to believe him honest and that his business was as he claimed it to be. Jonasen contradicts one of these witnesses absolutely, and says that he had no conversation with the other until after the arrest was made. There is also testimony tending to show that when the scales developed the difference in weight of the diamonds, Jonasen remarked, in effect, that he did not believe that Kennedy came by the stone honestly and was going to make him prove how he got it. We think that this statement of the evidence sufficiently answers Jonasen's assignment of error, that the court erred in refusing to direct a verdict for the defendant.

The plaintiff asked the following instruction, which was refused:

"If the jury believe from the evidence that Assistant County Attorney Shea was made acquainted with all of the facts affecting the question of the guilt of the plaintiff in this case which were known by the defendant in this action at the time the complaint was filed, and that after being made so acquainted with the material facts, the assistant county attorney drew the complaint which was afterwards sworn to by the defendant in this action upon the advice of said attorney, the presumption of malice is rebutted and the action for malicious prosecution will fail, and you will find for the defendant."

In order that the defendant in an action for malicious prosecution may be protected from liability because of following the advice of counsel, it must be made to appear

that before instituting the prosecution he made a true, full, and fair statement of all the facts upon which the complaint was based, was thereupon advised that he had grounds for prosecution, and that in good faith he acted solely upon that advice. (*Dreyfus v. Aul*, 29 Neb., 191; *Turner v. O'Brien*, 5 Neb., 542.) The evidence was not sufficient to warrant the jury in finding such a state of facts. Jonasen's testimony fails entirely to show what was said to the prosecuting attorney, except as follows: "What was said in his presence about the circumstances surrounding this case? Ans. I think he was standing by the table when we were discussing the matter. I claimed the difference could be the difference in that nick of the stone, and Mr. Kennedy claimed that it could not. That was the difference; that is the reason I don't have the diamond to-day." The witness Hays, a police officer, states that he saw Shea before the complaint was drawn and told him the circumstances under which Kennedy had been brought to the police station and about Jonasen's identifying the ring, but he does not say what the circumstances were which he related to him. In order to make this defense available the communications with the attorney must be proved. Then it is for the jury to say whether or not the statement was true and full. A witness cannot be permitted to draw that inference for the jury by testifying in general language that he did make a full statement or that he told all the circumstances. The instruction was rightly refused.

The court charged the jury as follows:

"The mere fact that the defendant had lost a diamond ring by theft, and that he suspected or believed that the ring which he found in plaintiff's possession was the ring which he had lost, was not of itself sufficient to constitute probable cause for the arrest of the plaintiff for the theft of the ring, and if he, the defendant, caused the arrest of the plaintiff for the larceny of the ring, based upon such belief only, he, the defendant, assumed the responsibility

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of being able to support his belief by proof of the fact that the ring found in plaintiff's possession was the identical ring which was stolen from the defendant, and if he could not produce sufficient testimony to establish that fact, and if, in addition thereto, he had no reasonable ground to believe that the plaintiff was the one who had stolen his (defendant's) ring, then the defendant had no probable cause for the arrest of the plaintiff for the larceny of the ring."

This instruction was correct. The plaintiff in error places too narrow a construction upon it. He construes it as conflicting with the rule that the possession of property shown to have been recently stolen is sufficient evidence to support a charge of larceny against the person having possession. The rule referred to states an inference of fact rather than of law; in other words, that the jury may find a prisoner guilty of larceny upon such evidence, but is not required to do so. And it is only permitted to so base a verdict of guilty where the property is found in the possession of the defendant recently after its theft. (*Thompson v. People*, 4 Neb., 524; *Smith v. State*, 17 Neb., 358.) In this case it was not shown when the ring had been stolen from Jonasen. It was shown affirmatively that Kennedy was not the person in Jonasen's store when the ring was stolen, and the rule referred to is, therefore, not applicable to the case. The instruction was that it was not sufficient, in order to make out a case of probable cause, that Jonasen should have lost the ring by theft and that he should suspect or believe that the ring in the plaintiff's possession was his; and, in effect, the remainder of the instruction was that in order to constitute probable cause defendant must have been able to produce sufficient testimony to identify the ring as his, and also have reasonable ground to believe that Kennedy had stolen it. It was a correct statement of the law. The identity of the ring was a fact particularly within Jonasen's knowledge, and no mere suspicion or

belief upon his part that the ring in Kennedy's possession was his could justify his conduct, unless by his own testimony or otherwise he was prepared to prove such identity. And in addition to establishing the identity of the ring, there being no evidence that it was in Kennedy's possession recently after the theft, and in view of the positive evidence that Kennedy was not the man who probably stole it from its place on Jonasen's show-case, Jonasen should, in order to justify the complaint, have been informed of other facts sufficient in the minds of reasonable men to justify him in believing that Kennedy was the thief.

Another instruction given by the court was as follows :

“ ‘ Probable cause ’ is defined to be a reasonable ground for suspicion supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious person in the belief that the person accused is guilty of the crime with which he is charged. If, therefore, you believe from all the testimony that there was reasonable ground for suspicion against the plaintiff, supported by such facts and circumstances as would have led an impartial and reasonably cautious man to believe that the plaintiff was guilty of the crime with which he was charged by the defendant, then you will be justified in saying that there was probable cause for the arrest of the plaintiff upon the complaint made by the defendant against him ; otherwise, not.”

It is urged that this instruction left the jury to determine the question of probable cause. There is no doubt that it is the duty of the court to say what facts constitute want of probable cause, and it is for the jury to determine whether such facts exist. But there are two reasons why the judgment should not be reversed on account of this instruction. The first is that at the request of the defendant himself the court gave the following instruction :

“ The jury are instructed that if you believe from the evidence that defendant had probable cause for instituting the criminal proceedings, then the plaintiff cannot

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recover in this suit. 'Probable cause' is defined to be reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant an impartial and reasonably cautious man in the belief that the person accused is guilty of the offense of which he is charged."

This is substantially like the one of which the defendant complains. A party cannot be heard to urge that an instruction is erroneous when he himself requested the giving of that instruction, or one similar in substance. Another reason is that the instruction was not erroneous. By it the court correctly defined the rule in regard to probable cause. (*Turner v. O'Brien*, 5 Neb., 542; *Ross v. Langworthy*, 13 Neb., 492.) The court in other instructions had told the jury what facts, if found by them to be true upon the evidence in the case, would establish a want of probable cause. In *Dreyfus v. Aul*, *supra*, relied upon by plaintiff in error upon this point, the court merely told the jury generally that it should find for the plaintiff if it found that the prosecution was commenced without probable cause, and in none of the instructions informed the jury what would constitute probable cause. That case is, therefore, not in point. It was not erroneous to tell the jury in general terms what the law meant by a "want of probable cause" when such instruction was accompanied by other instructions as to what facts would constitute want of probable cause in the case on trial.

The first instruction given by the court is complained of. This instruction was as follows:

"The court instructs the jury that if they believe from the evidence that the defendant maliciously caused the arrest and imprisonment of the plaintiff without probable cause, as alleged in the petition, then the jury should find for the plaintiff and assess his damages at what they think proper from the facts and circumstances proved, not exceeding, however, the amount claimed in the petition."

The same objection is urged to this,—that it left to the

jury the issue of probable cause. The same answer may be made to it. Instructions cannot be taken singly, but all instructions given must be taken together. If this instruction stood alone, it would be open to the objection urged against it. It is not erroneous in view of the other instructions.

The court refused the following instruction asked by defendant:

"The jury are instructed that in determining whether the defendant had probable cause to believe that the plaintiff was guilty they should consider that question in reference to the facts and circumstances relating thereto, and which influenced him in commencing proceedings against the plaintiff, as they were known or as they really appeared to be at the time he made the complaint, and not upon facts and circumstances as they have been developed by the evidence on this trial."

This instruction stated a correct principle of law, and the court might perhaps have given it without error, but there is no evidence in the record tending to show any information coming to Jonasen after he made the complaint which would throw a new light upon the question of Kennedy's guilt or innocence, and all of the instructions given by the court clearly enough confined the jury to a consideration of the facts within Jonasen's knowledge at the time the complaint was made.

During the examination of Jonasen the following question was asked: "Did you swear to that complaint with any malice towards Mr. Kennedy?" This question was objected to and the objection was sustained. It has been held in this state that where the issue is whether a transfer of property was made with intent to hinder, delay, or defraud creditors, it is proper to ask the assignor or vendor whether in making the transfer he did so with such intent. (*Campbell v. Holland*, 22 Neb., 587.) If such an inquiry is proper we see no reason why a direct inquiry as to

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whether or not a prosecution was instituted from malicious motives is not also proper, and the inference from *Turner v. O'Brien, supra*, is that such evidence should be admitted. But when we turn to the record we find immediately after this ruling of the court the following:

Q. Had you ever known Mr. Kennedy before?

A. I never saw him.

Q. Had you any other motives in filing that complaint than to charge a crime against a person whom you supposed had committed it?

A. No, sir; I am no hater of the man. I could not have the least object in holding a stranger that I did not know.

Q. You say that you had never seen Mr. Kennedy before that?

A. I never saw him before I saw him at the police station, that I know of.

By this examination the defendant got all the benefit that he could have had from a direct answer to the question, and the exclusion of the particular question objected to was not prejudicial.

JUDGMENT AFFIRMED.

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M. O. MAUL, ADMINISTRATOR, APPELLEE, V. MARIA  
HELLMAN, ADMINISTRATRIX, APPELLANT.

FILED FEBRUARY 8, 1894. No. 5086.

1. **Judicial Sales: SALE BY ADMINISTRATOR OF REAL ESTATE OF DECEDENT.** A sale of real estate of an intestate made by his administrator in pursuance of an order of the district court is a judicial sale.

2. ———: ———: **POWER OF COURT TO COMPEL PURCHASER TO PERFORM HIS BID.** A person by becoming a purchaser of property sold at a judicial sale becomes a party to the proceed-

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ing under which such sale is made, and may be compelled by the court in which the proceeding is pending to complete his purchase.

3. ———: ———: ———: CAVEAT EMPTOR. Appellant was the highest bidder for real estate sold by an administrator under a license of the district court therefor. His bid was accepted, the sale duly reported to the court and by it confirmed. After personal notice given appellant of the time and place when the hearing of the application for such confirmation would be heard, appellant made no appearance or objection to the proceedings to confirm, and afterwards refused to comply with his bid unless the administrator would apply the proceeds of the sale to the discharge of the incumbrances against the real estate, alleging an agreement with the administrator to that effect. *Held*, (1) That as the order of the court under which the sale was made expressly provided that the real estate should be sold subject to the incumbrances thereon, this order was a matter of public record, and of itself notice to appellant of the administrator's authority in the premises; (2) that under the laws of the state the administrator could only sell the interest his intestate had in the real estate at the date of his death. This law appellant was conclusively presumed to know, and having permitted the sale to be confirmed without objection, he could not then be heard to allege, as a reason why he should be released from his bid, an agreement with the administrator to misapply the proceeds of the sale in violation of law.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The opinion contains a statement of the case.

*Brome, Andrews & Sheean*, for appellant:

The rule that a purchaser may, by order, be compelled to comply with the terms of his bid applies only to proceedings involving the general equity jurisdiction, and do not apply to an administrator's sale. (Rorer, Judicial Sales, sec. 161.)

The court ought not, upon the facts proved, to have made the order, even had it the power. The rule *caveat emptor* has no application until after the sale is closed by delivery

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of deed and payment of purchase money. (*Ormsby v. Perry*, 6 Bush [Ky.], 553; *Graham v. Bleakie*, 2 Daly [N. Y.], 55.)

*Cowin & McHugh and Henry E. Maxwell, contra:*

A sale by an administrator under an order of the court, of lands of a decedent, is a judicial sale. The district court had jurisdiction to make and enforce the order appealed from. (Rorer, *Judicial Sales*, sec. 148; *Comp. Stats. Neb.*, ch. 23, secs. 67-122; *Halleck v. Guy*, 9 Cal., 181, 195; *Vandever v. Baker*, 13 Pa. St., 121, 126; *Grignon's Lessee v. Astor*, 2 How. [U. S.], 319; *Jones v. Read*, 1 La. Ann., 200; *Lynch v. Baxter*, 4 Tex., 437; *Worthington, Adm'r, v. McRoberts*, 9 Ala., 300; *Phillips v. Dawley*, 1 Neb., 320, 321.)

A purchaser at a judicial sale may be attached or committed as for contempt for a disobedience of an order to pay into court the purchase money. (*Lansdown v. Elderton*, 14 Ves. [Eng.], 512; *Goodwin v. Simonson*, 74 N. Y., 133; *Brasher v. Cortland*, 2 Johns. Ch. [N. Y.], 505; *Coulter v. Herrod*, 27 Miss., 685; *Seaman v. Hicks*, 8 Paige Ch. [N. Y.], 655; *Phillips v. Dawley*, 1 Neb., 320; Rorer, *Judicial Sales*, sec. 149.)

The order was properly made on the facts proved. The order of the court directing sale subject to the incumbrances was in conformity to the statute, and appellant was chargeable with notice by the terms of the order, and the requirements of the statute. (*Comp. Stats. Neb.*, ch. 23, sec. 99.)

RAGAN, C.

On the 12th day of May, 1890, M. O. Maul, administrator of the estate of A. B. Snowden, sold at public auction the east one hundred feet of lot 2, Bartlett's addition to the city of Omaha, having first obtained a license to make such sale from the district court of Douglas county. Meyer Hellman was present at such sale and the highest

bidder for the real estate offered. His bid was accepted and duly reported to the court. After personal notice to Hellman of the time and place when the motion to confirm said sale would be heard, it was duly confirmed by the court. Hellman refused to comply with his bid and pay the purchase money unless the administrator would deduct from the proceeds of the sale the amount of certain liens on the property which Hellman claimed that the administrator had agreed to do, and that he made his bid with that understanding. The administrator applied to the district court for an order to compel Hellman to comply with his bid. The court referred the matter to a referee to take evidence and report the facts and law to the court. The referee found that the incumbrances complained of were liens on the property at the death of Snowden; that the sale was regular, and fairly conducted by the administrator; that no fraudulent or misleading representations were made by the administrator or by any other person on his behalf to Hellman concerning the incumbrances, but that before the sale Hellman had actual notice of the incumbrances against the property; and the referee found and reported that the motion of the administrator to compel Hellman to comply with his bid should be sustained. Hellman filed exceptions to this report, which exceptions were heard by the court, and the report of the referee sustained, and an order made by the district court that Hellman should comply with his bid. From this order Hellman prosecutes an appeal to this court. His counsel allege two reasons why this order should be vacated: First, that the court had no power or jurisdiction to make this order; and second, that the order ought not to be made under the evidence in the case.

Whether the district court had jurisdiction to make the order appealed from depends upon whether the sale made by the administrator under the license granted by the court was a judicial sale. What is a judicial sale? "All sales

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made by order or decree under direction of the court and requiring confirmation by the court are judicial sales." (Rorer, Judicial Sales [2d ed.], sec. 29; *Chew v. Hyman*, 7 Fed. Rep., 7.)

The law of this state governing the sales of the real estate of intestates by administrators is found in chapter 23, Compiled Statutes, 1893. By section 67 of this act an administrator can only sell the real estate of his intestate when the personal estate is insufficient to pay the debts and charges of administration of the estate of the intestate.

By section 68 the administrator, in order to obtain a license for the sale of real estate of his intestate, must present a petition to the district court of the county in which he was appointed. In this petition he must set forth the amount of the personal estate that has come into his hands; how much of such personal estate remains undisposed of; the debts outstanding against the estate of the intestate; a description of all the real estate of which the intestate died seized, and the condition and value of such real estate; and this petition must be verified by the oath of the administrator.

By section 69 the district court is authorized, if it appears from an inspection of the petition that there is not sufficient personal estate in the hands of the administrator to pay the debts of the intestate and the expenses of administration, to make an order directing all persons interested in the estate to appear, at a time and place in such order specified, and show cause why license should not be granted to the administrator as prayed in the petition.

Section 70 requires that a copy of such order to show cause shall be personally served on all persons interested in the estate at least fourteen days before the time appointed for the hearing on the petition, or that such order shall be published four weeks in such newspaper as the district court shall direct in the order.

Section 72 provides that at the time and place appointed

in said order for a hearing on said petition the court, after finding, upon proof made, that the service of the order has been made as directed upon the parties interested in the estate, shall hear and examine the allegations of the petition, hear such proofs as may be offered by the administrator, and by any and all persons interested in the estate who may desire to and do oppose the granting of the license prayed for.

Section 73 provides that the administrator may be examined on oath; that witnesses may be produced and examined by either party to the proceeding, and that the court may issue process to compel the attendance of witnesses and the taking of testimony, as in other cases.

Section 79 provides that if the court shall be satisfied, after a full hearing upon the petition and an examination of the evidence that it is necessary to sell a whole or a part of the real estate for the payment of the valid claims against the intestate and the charges of administration, the court shall then make an order of sale authorizing the administrator to sell the real estate of the intestate.

Section 80 provides that this order of sale shall specify the lands to be sold, and that the court may direct the order in which the several tracts, lots, or parcels shall be sold.

Section 81 provides that after such order of sale has been made the judge of the court shall deliver a certified copy of it to the administrator, and this shall be his authority for the sale of the real estate of the intestate.

Section 83 provides how and what notice of sale shall be given by the administrator; but provides that if there shall be no newspaper printed in the county in which the sale is to be held, that notice of such sale shall be given by being published in such paper as the court may direct.

Section 87 provides that the administrator, after making such sale, shall immediately make a report of his proceedings under the order of sale to the district court granting

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the same, and if such court shall be of the opinion that the proceedings of the administrator were unfair, or that, if another sale were had, the bid for the real estate could be increased as much as ten per cent, exclusive of the expenses of a new sale, then the court shall vacate the sale and direct another.

Section 88 provides that if the district court shall be of the opinion that the sale by the administrator was legally and fairly conducted, and that the sum bid for the property is not disproportionate to its value, or if disproportionate, that the amount realized would not be increased as much as ten per cent by a new sale, then the court shall make an order confirming such sale and direct the administrator to execute a conveyance to the purchaser.

It will be observed that a proceeding by an administrator to sell the real estate of his intestate is, under this statute, in all respects a judicial proceeding. The sale can only be made by authority of and by an order of the court. The order to make the sale can only be granted by the court, or judge thereof, after due notice to all persons interested in the estate of the intestate. The application of the administrator for leave to sell the real estate must be heard like any other proceeding by the court, and granted or denied after hearing the evidence. Finally, after the sale has been made it must be reported to the court, and is not a sale until confirmed. By the term "court" herein is meant the court or judge thereof when authorized to act. The administrator and the entire proceeding are under control and direction of the court from the time of the filing of the petition until the proceeding is ended and determined by the conveyance of the real estate sold to the purchaser thereof. It certainly cannot be doubted but that the court in this case had power, had the appellant complied with his bid, to compel the administrator to execute and deliver to him a conveyance for the real estate sold; and appellant by becoming a purchaser made himself a party to the proceed-

ing and brought himself within the control and the power of the court quite as much as the administrator himself. This statute, then, and the steps required to be taken thereunder for the sale by an administrator of the real estate of his intestate, bring the proceeding, out of which the order complained of grew, within the definition of a "judicial sale," quoted above. (See also *Halleck v. Guy*, 9 Cal., 181; *Lynch v. Baxter*, 4 Tex., 431; *Vandever v. Baker*, 13 Pa. St., 126.)

Ought the order appealed from not to have been made upon the facts proved in this case? His counsel say appellant acted in good faith, with no intent to deceive the court or interrupt the orderly dispatch of its business, and to compel him to comply with his bid will require him to pay the sum of \$800 more for the property than he supposed he was paying. The answer to this is that appellant's claim that he bid in this property relying on an agreement of the administrator to pay off the liens thereon out of the purchase money has been found against appellant, both by the chancellor and the referee, and the evidence in the record sustains their finding. It also appears from the evidence before us that appellant had actual knowledge of the terms and conditions on which this sale was to be made, and of the incumbrances existing against the real estate, yet he was present at the sale and bid on the property; that he was given actual personal notice that the administrator, at a certain time and place mentioned, would move the district court for a confirmation of the sale. This notice he disregarded. Having bid in the property at the sale, he made himself a party to the proceeding, and if he had any reason to urge why he should be released from his bid, he should have appeared and resisted the motion to confirm the sale. (*Phillips v. Dawley*, 1 Neb., 320.) To remain silent while the motion to confirm the sale was pending, and afterwards refuse to comply with his bid, was to trifle with the court and delay the administration of jus-

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tice. This record discloses no fact which calls for the exercise of the powers of the court in behalf of the appellant. The decree or order under which this real estate was sold expressly provided that it should be sold subject to the incumbrances thereon. This order of sale or license or decree was a matter of public record and of itself notice to all bidders at the sale made under it. Again, section 75, chapter 23, Compiled Statutes, 1893, provides that the proceeds of any real estate sold for the payment of the debts of an intestate shall be assets in the hands of an administrator, in like manner as if the same had been originally part of the goods and chattels of the intestate, and that the administrator and the sureties on his bond shall be accountable and chargeable therefor. And section 99 of said chapter provides that all sales of land made by administrators for the payment of the debts of their intestate shall be made subject to all liens on such real estate, whether by mortgage or otherwise, existing at the time of the death of the intestate. This law appellant was conclusively presumed to know and bound to obey, and he cannot now be heard to say, under the facts in evidence in this case and as a reason for being released from his bid, that he and the administrator agreed to violate the law by appropriating the proceeds of the sale of the real estate to the discharge of the incumbrances thereon. An administrator can only sell the interest his intestate had in the real estate at his decease, and the title acquired to such real estate by the purchaser thereof at an administrator's sale made under a decree of the court, when all the requirements of the law have been complied with, is, in effect, a quitclaim deed from the heirs of the intestate. There is no error in the order appealed from and the same is in all things

AFFIRMED.

## MARCO A. UPTON V. ROSA LEVY.

FILED FEBRUARY 8, 1894. No. 5184.

1. **Findings of Fact: REVIEW.** It is a settled rule of this court that the finding of fact made by a jury or trial judge will not be disturbed if supported by competent evidence.
2. **New Trial: NEWLY-DISCOVERED EVIDENCE.** A new trial will not be granted a litigant on the ground of newly-discovered evidence when it appears that such evidence was not produced at the trial of the case because the litigant had forgotten its existence.
3. **False Representations: DECEIT: COUNTER-CLAIM: PLEADING.** To maintain a counter-claim for damages for false representations, the defendant must allege and prove (1) what representations were made; (2) that they were false; (3) that the defendant believed the representations to be true; (4) that he relied and acted on them; (5) and that he was thereby injured.

· ERROR from the district court of Douglas county. Tried below before CLARKSON, J.

*B. G. Burbank*, for plaintiff in error.

*Slabaugh, Lane & Rugh*, contra.

RAGAN, C.

Rosa Levy sued Marc A. Upton in the district court of Douglas county and for cause of action alleged: That on April 27, 1887, in consideration of a thousand dollars then paid him, Upton sold and conveyed to her by warranty deed an undivided one-half of lot 11, block 77, in South Omaha, Nebraska; that said deed contained a covenant that he, Upton, was lawfully seized of said premises, that he had good right and lawful authority to sell the same, and that he would forever warrant and defend the title to the said premises to the said Rosa Levy, her assigns, against the claims of all persons whomsoever. She alleged a

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breach or failure of said covenant and that she had been, by legal process, dispossessed of said premises by the owner of the paramount title thereto.

The answer of Upton, so far as material to this opinion, was in the nature of a plea of confession and avoidance and counter-claim. It alleged that one Jacob Levy was the husband and agent of Rosa Levy, and that about March 10, 1887, Jacob informed him, Upton, that said real estate could be purchased at a low price and proposed that he, Jacob and Upton, buy the same, each to own one-half; that shortly after that Jacob came again to Upton in company with one William Jones, and Jacob then stated to Upton that Jones owned said premises; that Upton purchased said premises for \$2,000, paying \$1,000 cash and giving a mortgage thereon for \$1,000, took the title to the real estate in his own name, one-half, however, he held in trust for Jacob, to be conveyed to him when he should furnish his one-half of the cash payment; that on the 27th day of April, 1887, Jacob paid Upton the \$500 and he made a deed for one-half the property to Jacob's wife, at his request, the conveyance being subject to the thousand dollar mortgage thereon, the payment of one-half of which Jacob's wife assumed; that said Jones did not own said real estate, as Jacob represented and knew, but had long before conveyed and given actual possession of it to one Lipp; that Jacob made such representations, knowing them to be false, and for the fraudulent purpose of cheating and defrauding him, Upton, and by them he had been damaged \$500 paid for the land, \$300 attorney's fees paid in defending the title against Lipp, and \$1,000 he had paid on the note given as part purchase money for the premises. The prayer was that Mrs. Levy's suit might be dismissed and Upton be given judgment against her for \$1,800.

Mrs. Levy's reply was a general denial of the allegations of the new matter in this answer.

The case was tried to a jury on the issues presented by

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these pleadings, and a verdict returned in favor of Mrs. Levy for \$687.50. The court overruled a motion for a new trial, rendered a judgment on the jury's finding, and Upton brings the case here for review.

The errors alleged here for a reversal of the judgment are three:

1. That the evidence does not support the verdict rendered. The questions of fact litigated before the jury were whether Jacob made the representations as to Jones' ownership of the lots, and whether Jacob or his wife, Rosa, was the real owner of the property conveyed by Upton to Rosa Levy. The burden was on Upton to establish these allegations of his answer. A careful study of the evidence fails to convince us that the jury's findings are wrong. There was a sharp conflict in the testimony on all the issues. The weight to be given the evidence and the credibility to be given the witnesses, the law has confided to the jury, and there is ample evidence in the record, if believed by the jury, to support their verdict; and we cannot say that the jury erred in believing certain witnesses and certain statements and in not believing other witnesses and other statements. It is a settled rule of this court that the finding of fact, made by a jury or trial court, will not be disturbed if supported by competent evidence.

2. The second error alleged by Upton is that the court erred in overruling his motion for a new trial asked for on the grounds of newly-discovered evidence. The evidence which Upton claims is newly discovered is a check dated March 24, 1887, for \$150, drawn on the Merchants National Bank by one Dr. Hoffman, payable to the order of J. Levy, and indorsed by the latter. Upton claims that Jacob Levy borrowed the money represented by this check from Hoffman, and paid it to him, Upton, as a part of the five hundred dollars which Upton swears Jacob was to and did pay him as the cash consideration for the conveyance of the property to Mrs. Levy. The excuse offered by Mr.

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Upton for not producing this check at the trial is that, owing to the number of business transactions in which he was engaged during the year 1887, he forgot the circumstance of its existence and the memorandum made by him of its receipt and payment. There is one sufficient reason why the court did not err in giving Mr. Upton a new trial on account of this evidence, viz.: It does not appear that this evidence could not have been discovered and produced at the trial, if Mr. Upton had exercised reasonable diligence. This suit was brought April, 1889, and the trial occurred in October, 1890. If courts should grant litigants new trials in order to enable them to produce evidence which they had forgotten existed, there would be few final judgments rendered. Another item of evidence which Mr. Upton claims was newly discovered, and on which he asks a new trial, is that one Freyhan will now swear that Jacob told him, Freyhan, that he, Jacob, owned a one-half interest in the property and that the other one-half could be purchased from Mr. Upton for one hundred dollars; that Freyhan, as agent for one Altschuler, advanced Jacob the one hundred dollars, and he went to Mr. Upton and purchased his interest in the property for Altschuler, and that Freyhan subsequently finding the title bad went to Upton and demanded and received back the one hundred dollars. Mr. Upton certainly knew this, if true, and no valid reason is shown for not producing it at the trial.

3. The third error alleged is the giving to the jury by the court the following instruction: "Should you be satisfied by a preponderance of the evidence that Jacob Levy was plaintiff's agent; that by false and fraudulent representations, knowing them to be false, or by fraudulent concealment of the facts within his knowledge and unknown to defendant," etc. The fault found with this instruction is that by it the court limited Mrs. Levy's liability for the fraudulent representations of her agent, Jacob, to such false

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representations as he made, knowing them to be false. We do not determine whether this instruction was right or not. Mr. Upton is in no position to complain of it. He pleaded that the representations made by Jacob were false and fraudulent and at the time known by Jacob to be so, and tendered that issue to the jury by his evidence. Again, the answer or counter-claim of Mr. Upton does not allege that he believed or relied on the alleged false statements made by Jacob, and furthermore, although Mr. Upton testified in his own behalf at the trial, yet there is in the record no statement of his that he believed or relied and acted upon the alleged false representations which he says were made to him by Jacob. Mr. Upton then, by his counter-claim, did not state a cause of action against Mrs. Levy, nor by his evidence did he prove one. (*Stetson v. Riggs*, 37 Neb., 797; *Runge v. Brown*, 23 Neb., 817.)

The judgment of the district court is right and the same is in all things

AFFIRMED.

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FRED SCHROEDER V. DAVID H. NIELSON.

FILED FEBRUARY 8, 1894. No. 5272.

1. **Negotiable Instruments: CONSIDERATION.** A promissory note given for the privilege of using or selling an article which all men are equally at liberty to lawfully use and sell, lacks consideration to support it.
2. ———: **ACTION BY INDORSEE: BURDEN OF PROOF.** In a suit against the maker of a promissory note by an alleged indorsee thereof, as such, the defendant's answer denied plaintiff's ownership. *Held*, To entitle plaintiff to recover, he must establish, by competent evidence, that the indorsement on the note was that of the payee.
3. **Contracts: RULE OF CONSTRUCTION.** Where the terms of an agreement were intended in a different sense by the parties

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thereto, in a suit between the parties on such agreement the court will construe the agreement as understood by one party when the evidence shows that the other was aware of such first party's understanding of the agreement, and that such understanding induced him to execute it.

ERROR from the district court of Douglas county. Tried below before ESTELLE, J.

*W. S. Felker and H. B. Holsman*, for plaintiff in error.

*G. E. Bertrand*, contra.

RAGAN, C.

Fred Schroeder sued David H. Nielson in the district court of Douglas county on a promissory note given by the latter to Ingolsbe & Co., and by them assigned to Schroeder. The case was tried to the court, a jury being waived, and Nielson had judgment, and Schroeder brings the case here on error.

The trial court specifically found that the note was given without consideration and that Schroeder purchased it with knowledge of that fact. The evidence fully supports the findings of the court.

Counsel for plaintiff in error cite us to numerous authorities, among others, *Moses v. Comstock*, 4 Neb., 516, and *Nash v. Lull*, 102 Mass., 60, to show that a note, given for a patent right or license to use or vend a patented invention, is supported by good consideration; but these authorities are not in point here. There is nothing in this record showing, or tending to show, that the note in suit was given for a patent right or for a license to use or vend one. To put it mildly, this note was procured by false pretenses. As it may be useful in practice, we quote the "article of agreement" executed between the original parties to this note at the time it was given:

"Article of agreement, made and entered into this 15th day of December, A. D. 1887, by and between Ingolsbe

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& Co., of Chicago, state of Illinois, parties of the first part, and D. Nielson, of Union, of the county of Douglas, state of Nebraska, party of the second part, witnesseth:

“That said parties of the first part, as legal owners of an improved machine to manufacture the combination slat and wire fence, and desiring to establish a permanent industry in Douglas county for the purpose of manufacturing and selling said fence, do hereby make and constitute the party of the second part a lawful agent, with power to contract, build, or sell, the manufactured fence in the township of Union, county of Douglas, state of Nebraska. The manufactured fence to be kept in stock by the manufacturing agent, Veny Kelsey, at Millard, county of Douglas, state of Nebraska, and at all times to be furnished to the second party at wholesale prices: 35–40 cents per rod for two-foot or hog fence; 50 cents per rod six-wire fence; 60 cents per rod for eight-wire fence; and 65 cents per rod for ten-wire fence. All the fence to be composed of No. 12 annealed steel and galvanized wire, with forty-six pickets per rod. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and on all sales made by him or at the factory to credit the township agent wherein the fence goes with all in excess of wholesale prices, the same to be sold so that the net profit to the agent shall at all times be fifteen cents per rod, or \$48 per mile.

“The party of the second part, for and in consideration of the rights and privileges herein granted, does hereby agree to use his endeavors to sell the fence in the above named territory, keep a true account of the same, and remit by draft or postal order to the first parties five cents per rod of the commission, after he has received all of the commission amounting to \$360 on the first twenty-four hundred rods sold, as he has this day paid \$120 to the first parties by the execution of his obligation, his commission on eight hundred rods, said eight hundred rods to be sold

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in one year from above date, as said obligation is given in consideration of the township, two-thirds interest in the business and privileges herein granted, and if said eight hundred rods of fence are not sold at the expiration of one year, and said \$120 not obtained by the extended date of one year from maturity of said obligation, said Ingolsbe & Co., or their authorized representatives, are unconditionally empowered to cancel said obligation of said agent and appoint another agent in his stead, returning to said agent the original obligation of \$120, but not the amount of commissions paid thereon.

"The second party has also the right to use on all his own lands the fencing at factory prices and the exclusive management of the business in his territory, and is to report amount of business by letter, to the first parties at the general office in Chicago, Ill., quarterly, on or before January, April, and October.

"In witness whereof, we have hereunto set our hands the day and year above written.

"INGOLSBE & Co.

"DAVID H. NIELSON."

Neither by this agreement, nor the evidence, does it appear that the "combination slat and wire fence" was a patented article or invention, and the court certainly will not presume it was. For aught that this record shows, any person had the lawful right at all times and places to manufacture, build, buy, and sell this fence. A promissory note given for the privilege of using or selling an article which all men are equally at liberty to use and sell, lacks consideration to support it. But this "article of agreement" must be construed as the agent of Ingolsbe & Co. knew at the time it was signed by Nielson that he understood it. (Sec. 341, Code Civil Procedure.) It is clear from the evidence that Nielson understood, when he executed the note in suit, that the article of agreement required that the note should be canceled and returned to him if he

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did not, within one year, sell sufficient fence to earn him a commission of \$360; that the party who induced Nielson to execute the new agreement put such a construction on the agreement and thus procured Nielson's signature to the note. Ingolsbe & Co., if there is such a firm, could not enforce this note against Nielson, and Schroeder not being an innocent purchaser, is in no better condition. This judgment is right for another reason. The answer of Nielson denied Schroeder's ownership of the note. The note was drawn payable to the order of Ingolsbe & Co. It was indorsed "Ingolsbe & Co., O. Ingolsbe." There was no proof offered that the indorsement "Ingolsbe & Co." was made by that firm, a member thereof, or by any one else. The note was offered and admitted in evidence, but that did not prove that the indorsement thereon was that of the payee. The judgment of the district court is

AFFIRMED.

N. A. RAINBOLT V. A. L. STRANG.

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FILED FEBRUARY 8, 1894. No. 4824.

1. **Pleading: DEFENSE OF USURY.** The Code of Civil Procedure provides that a pleader shall state facts and not conclusions; and it is essential to a plea of usury that it state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It must also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved, in the transaction.
2. ———. This was a suit on a contract. The answer of the defendant, set out in the opinion, *held*, not to state facts sufficient to constitute the defense of usury.

**ERROR** from the district court of Douglas county. Tried below before HOPEWELL, J.

*Brome, Andrews & Sheean*, for plaintiff in error, cited: *Blain v. Wilson*, 32 Neb., 302; *McArthur v. Schenck*, 31 Wis., 673.

*Montgomery & Montgomery, contra.*

RAGAN, C.

N. A. Rainbolt sued A. L. Strang in the district court of Douglas county for damages for his failure to purchase of Rainbolt certain certificates of stock of the Norfolk Water-Works Company. Strang's contract of purchase was in writing and as follows:

"December 4, 1888, for value received, I, A. L. Strang, of Omaha, Nebraska, do hereby agree to purchase and pay for, within ninety days from this date, certificate No. 10 and certificate No. 29, one for five and the other for four shares, of \$100 each, in the Norfolk Water-Works Company, the sum of \$300, and on payment of said sum within said date, I am entitled to said certificates, the same having been issued to me and by me indorsed to N. A. Rainbolt to whom this agreement is made.

"A. L. STRANG."

Rainbolt alleged in his petition the tender of the certificates to, and demand of, Strang that he comply with his contract, his refusal so to do, and that such certificates were of no value. He tendered them in court to Strang and prayed judgment in his petition for \$300 and interest.

Strang answered the petition as follows:

"Now comes the defendant and, answering plaintiff's petition, alleges the fact to be that said writing and agreement is wholly without consideration, and was delivered by the defendant to the plaintiff under the following circumstances, to-wit: On or about the 4th day of December, 1888, and prior thereto, one C. G. Miller, of Norfolk, Nebraska, had advanced money for this defendant and to whom this defendant was at that time indebted in the sum

of \$5,000, which amount this defendant was at that time unable to pay to said Miller. Said Miller was then in need of money and was compelled to pay usurious interest to the Norfolk National Bank, of Norfolk, Nebraska, of which the plaintiff herein is president, he, said Miller being required to pay interest at the rate of one and one-half per cent each month, upon money that he was at that time and had been borrowing from said plaintiff, and his bank. On said date mentioned, this defendant entered into an agreement with the plaintiff that the plaintiff and his bank should loan to the said C. G. Miller such sums of money as he should require, at the rate of eight per cent interest; and that this defendant, in consideration of the said bank and the said plaintiff accommodating the said Miller with loans at the said rate of eight per cent interest, then and there agreed to and did execute to the said plaintiff a note or acceptance bearing said date for the sum of \$300, due ninety days after date, and at the same time this defendant delivered to the said plaintiff, as collateral security to said note, nine shares of stock, being the two certificates of stock in the Norfolk Water-Works Company, mentioned in plaintiff's petition, and at the request of the plaintiff executed the agreement set up by plaintiff in his petition.

"This defendant alleges the fact to be that said plaintiff still holds the said promissory note or acceptance above mentioned, as well as the said certificates of stock and the said agreement in writing mentioned in plaintiff's petition; that they are wholly without consideration and were executed contemporaneously by this defendant and accepted by the said plaintiff for the sole and only purpose of inducing the plaintiff and his bank to forbear charging the said Miller a usurious rate of interest and in order that a usurious interest might be received of this defendant for the said loan to said Miller."

To this answer Rainbolt replied by a general denial.

The case was tried to a jury, and at the conclusion of the

testimony the court instructed the jury to return a verdict for Strang. Rainbolt's motion for a new trial was overruled, a judgment rendered upon the verdict, and the case is here on error.

On the trial to the jury, counsel for Rainbolt objected to the introduction of any evidence on behalf of Strang, for the reason that his answer did not state facts sufficient to constitute a defense. This objection was overruled and Rainbolt excepted.

The only error assigned here which we shall notice is the ruling of the court holding that the answer stated facts sufficient to constitute a defense. This answer attempts to state two defenses: First, no consideration for the contract sued on. It will be observed that Strang alleges that the money he promised to pay for the stock certificates was \$300, represented by the note given to Rainbolt in consideration that he would lend Miller money at eight per cent interest and would forbear charging him usurious rates of interest. This contract, then, was not without consideration to support it when made. The answer does not allege that Rainbolt did not lend Miller money at the rate agreed, and does not allege that Rainbolt did not comply with his agreement not to charge Miller usurious rates of interest, and hence does not show a failure of consideration. The second defense attempted to be set up by Strang in his answer is that the \$300 note he gave Rainbolt, and secured by stock certificates, was for money in the nature of a bonus agreed to be paid Rainbolt for money he was to lend Miller at eight per cent, which interest, added to the \$300, would render the loan to Miller usurious. But Strang does not allege how much money Rainbolt agreed to lend Miller, nor whether he did lend him any; nor does he allege what length of time the loan which Rainbolt was to make Miller was to run. For anything that this answer shows, Rainbolt may have agreed to and may have loaned Miller \$5,000, the amount Strang

owed him for three years, at eight per cent interest per annum. If he did so, the interest paid or promised to be paid by Miller, added to the \$300 promised to be paid by Strang, would not taint the transaction with usury. The Code of Nebraska provides that a pleader shall state the facts and not conclusions, and it is essential to a plea of usury that it state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It should also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved, in the transaction. (*Manning v. Tyler*, 21 N. Y., 567; *New England Mortgage Security Co. v. Sandford*, 16 Neb., 689.) The answer of Strang, then, is bad for want of these essential allegations, and being thus defective, and no application to amend it on the trial so as to present a defense having been made, no evidence should have been admitted in his behalf under it. The judgment must be reversed and it is so ordered.

REVERSED.

FARMERS & MERCHANTS BANK OF YORK, APPELLANT,  
V. HENRY F. ANTHONY ET AL., APPELLEES.

FILED FEBRUARY 8, 1894. No. 6040.

1. **Validity of Unrecorded Chattel Mortgage: RIGHTS OF CREDITORS.** When the possession of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed as required by section 14, chapter 32, Compiled Statutes, 1893, the mortgage is absolutely void as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage or not. *Houk v. Condon*, 40 O. St., 569, *Sayre v. Hewes*, 32 N. J. Eq., 652, and *Brothers v. Mundell*, 60 Tex., 240, followed.

2. ———: **BONA FIDE PURCHASERS OF CHATTELS.** It seems that

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48	832

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a "subsequent purchaser in good faith," within the meaning of section 14, chapter 32, Compiled Statutes, 1893, is one who acquires title to mortgaged property by contract with the mortgagor or his vendee, after the execution of the mortgage and without notice thereof; and that a purchaser of such property at execution sale, would take it discharged of the mortgage lien, irrespective of such purchaser's knowledge of the existence of such mortgage lien.

3. **Marshaling Securities: CHATTEL MORTGAGE LIEN: LIEN OF LEVY.** The rule of compelling a first resort to a particular one of two funds for a creditor's benefit, who can reach but one of them, will not be enforced, when to do so will operate to the prejudice of the party entitled to the double fund. *Sweet v. Redhead*, 76 Ill., 374, followed.

APPEAL from the district court of York county. Heard below before WHEELER, J.

The opinion contains a statement of the case.

*M. B. Reese, E. E. Brown, and G. W. Bemis*, for appellant:

A purchaser who has actual notice of the claim of a third party in the property purchases subject to such right, although the instrument under which the third party claims is not of record. (*Railsback v. Putton*, 34 Neb., 490; *Russell v. Longmoor*, 29 Neb., 209; *Patrick v. Paulson*, 34 Neb., 416.)

If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of both claims. (Story, Eq. Juris., sec. 633; *Ingalls v. Morgan*, 10 N. Y., 178; *Kurdig v. Landis*, 135 Pa. St., 612; *Fassett v. Mulock*, 5 Col., 466.)

*Gilbert Bros., contra:*

The clear meaning of section 1796, Cobbey's Statutes, is,

that an unrecorded mortgage is void as to creditors absolutely without qualification, and that it is void as to subsequent purchasers and mortgagees in good faith; in other words, the qualification "in good faith" applies to "subsequent purchasers and mortgagees" alone, and not to creditors. This is the construction which is placed upon identical statutes in other states. (Jones, *Chattel Mortgages* [3d ed.], sec. 318; *Farmers Loan & Trust Co. v. Hendrickson*, 25 Barb. [N. Y.], 484; *Tyler v. Strang*, 21 Barb. [N. Y.], 198; *Tiffany v. Warren*, 37 Barb. [N. Y.], 571; *Sayre v. Hewes*, 32 N. J. Eq., 652; *Houk v. Condon*, 40 O. St., 569; *Brothers v. Mundell*, 60 Tex., 240; *Pyle v. Warren*, 2 Neb., 241; *Ransom v. Schmela*, 13 Neb., 76; *Earle v. Burch*, 21 Neb., 702.)

If a party has two mortgages to secure a debt, both of them due, and there is any advantage which will accrue to him by foreclosing either one first, the law allows him to exercise his option as to the order of foreclosure. (*Swift v. Redhead*, 76 Ill., 374; *Cutler v. Ammon*, 21 N. W. Rep. [Ia.], 604; *Clarke v. Bancroft*, 13 Ia., 320.)

#### RAGAN, C.

During the summer of 1890 the York National Bank, of the city of York, in York county, Nebraska, loaned \$4,000 to Henry F. Anthony with which to buy flaxseed. The money was advanced at different times in sums of \$1,000, Anthony giving the bank a note for each thousand when advanced and a chattel mortgage calling for a thousand bushels of flaxseed. The flaxseed, covered by four mortgages, was commingled in one bin. Some time prior to February 11, 1892, the notes of Anthony remaining unpaid, the bank discovered that the bin contained not 4,000 bushels of flaxseed, but about 2,000 bushels, and on said date procured Anthony to confess judgment in its favor on the first one of said four notes for \$1,000, caused an execution to be issued on said judgment and placed in the

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hands of an officer, who levied the same upon some grain belonging to Anthony. This grain was at the time stored in elevators and had been purchased by Anthony with money borrowed of the Farmers & Merchants Bank of said York county. This bank, at the time of the levy on the grain, held three chattel mortgages thereon, given to it by Anthony as security for money so borrowed by him of the bank. These mortgages, nor copies thereof, at the date of the levy of the execution on said grain, had not been filed in the office of the county clerk of said York county. After the officer had seized Anthony's grain under the execution, the Farmers & Merchants Bank filed its mortgages and brought this suit against Anthony, Snodgrass, the officer, and the York National Bank, to enjoin Snodgrass from selling the grain levied upon, to have its three mortgages declared a first lien upon the grain, and a decree entered for its sale to pay the amount due it from Anthony; or, if the court should decide the York National Bank's lien on the grain, by reason of the levy of the execution thereon, was superior to the lien of the Farmers & Merchants Bank by virtue of its mortgages, then to compel the York National Bank to apply the value of the flaxseed on hand, and on which it held mortgages, to the payment of the note reduced to judgment, and on which the execution levied on the grain had been issued. The Farmers & Merchants Bank also alleged in its petition that the York National Bank, at the time and before its levy of the execution on the grain, had actual knowledge of the existence of the mortgages sought to be foreclosed, and this allegation was not denied in the answer of the York National Bank. The district court found that by the agreement with Anthony, and by virtue of the four mortgages given by him to the York National Bank, it had a lien on all the flaxseed in said bin securing the entire sum of \$4,000, evidenced by his four notes, and that no part of either of said notes had been paid; that the value

of the flaxseed covered by the York National Bank's mortgages did not exceed \$1,500; that the York National Bank had neither actual nor constructive notice of the existence of the mortgages held by the Farmers & Merchants Bank on Anthony's grain prior to its seizure under the execution; that the York National Bank, by virtue of the levy of the execution on the grain of Anthony, acquired a lien thereon superior to the mortgage lien of the Farmers & Merchants Bank; that the Farmers & Merchants Bank was not entitled to a decree compelling the York National Bank to apply any part of the value of the flaxseed on which it had mortgages to the satisfaction of the judgment against Anthony, and rendered a decree accordingly. The Farmers & Merchants Bank appealed.

For the purposes of this opinion we shall disregard the finding of the district court, that the York National Bank had no actual notice of the mortgages held by the Farmers & Merchants Bank on the grain levied upon, and assume that, at and before the York National Bank caused the grain in controversy to be levied upon, that bank did have actual knowledge that Anthony had pledged it, by the mortgages in suit, to the Farmers & Merchants Bank, to secure money borrowed from it by him and used in the purchase of the grain mortgaged. The correctness of the decree of the district court is assailed here on two grounds:

1. That although copies of appellant's mortgages had not been filed in the office of the county clerk of York county at the time of the seizure of the grain on the execution, yet the York National Bank, having actual knowledge of the existence of said mortgages, could not, and did not, by the seizure of the mortgaged grain on execution, acquire a lien thereon superior to the lien created by the mortgages. No claim is made here that appellant was ever in possession of the grain covered by these mortgages, nor that the York National Bank was not in fact a creditor of the mortgagor, Anthony. We have, then, the clear ques-

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tion, does the fact that a creditor, knowing his debtor has mortgaged his personal property, a copy of such mortgage not being filed and the debtor remaining in possession of the property, estop such creditor from seizing the property on execution and holding it as against such mortgagee?

Section 14, chapter 32, Compiled Statutes, 1893, provides: "Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk," etc. By this law, then, a chattel mortgage, when the same, or a copy thereof, is not filed in the clerk's office, and no actual change of possession of the mortgaged property has occurred and continues, is absolutely void as against the creditors of the mortgagor. Whether a creditor has knowledge of such a mortgage is immaterial. So far as he and his rights are concerned, such a mortgage does not exist. The term "creditor" in this statute means a judgment, execution, or attachment creditor; that is, a creditor who is using the courts of law and their processes for the collection of his debt.

Statutes in all essential respects the same as ours exist in the states of New York, New Jersey, Ohio, Michigan, and Minnesota, and have been before those courts for construction, and the writer is not aware of any decision which holds that under such a statute as this, knowledge on the part of a creditor that his debtor had executed a chattel mortgage, which mortgage, or a copy thereof, had not been filed, and under which no change of possession of the things mortgaged had occurred, precludes the creditor from seizing, on execution, the property described in the mortgage of his debtor. Such is the doctrine in New Jersey.

In *Sayre v. Hewes*, 32 N. J. Eq., 652, it is said: "Unless a chattel mortgage is filed in the county where the mortgagor resides at the time of its execution, or the mortgagee takes immediate possession of the mortgaged chattels and continues in the actual and constant possession of them, the mortgage is absolutely void against the creditors of the mortgagor. \* \* \* The statute concerning chattel mortgages makes an important distinction between creditors and subsequent purchasers or mortgagees. Purchasers or mortgagees, to avail themselves of a default on the part of a prior mortgagee, must take without notice of his rights, but a creditor is not affected by such notice." Such is the doctrine of the supreme court of Ohio. See *Houk v. Condon*, 40 O. St., 569, where it is said: "This case requires the determination of two questions: Did the levy of the executions create a lien on the wheat prior to the lien of the chattel mortgage of plaintiff in error? \* \* \* The wheat was levied upon on May 21st. At that time the mortgage to Houk was on file in the township in which the property was. The statute required the mortgage to be on file in the township in which the mortgagor resided. This section of the statute provides that unless the mortgage shall be filed in the township in which the mortgagor resides it shall be void as against the creditors of the mortgagor, subsequent purchasers and mortgagees in good faith. Under this provision, the mortgage not being on file with the clerk of the township where the mortgagor resided, it was void as to creditors. \* \* \* The rule applicable to a mortgagee in good faith is not applicable to a general creditor. A mortgagee may give credits solely upon the faith of the mortgage security, which, if taken in good faith, is valid. The lien created by it arises from the acts of the parties, while the lien of a levy arises by operation of law." To the same effect see *Brothers v. Mundell*, 60 Tex., 240; Jones, Chattel Mortgages, sec. 318.

As opposed to the views expressed by the above authori-

ties, counsel for appellant call our attention to *Russell v. Longmoor*, 29 Neb., 209, and *Patrick v. Paulson*, 34 Neb., 416. Those cases, however, are not in point here. The contest in those cases was between mortgagees of the same property. We are also referred by appellant's counsel to *Railsback v. Patten*, 34 Neb., 490. In the syllabus of this case it is stated that one who purchases property with knowledge that another has an unfiled mortgage lien thereon, is not a purchaser "in good faith" as against such mortgagee. This language is not in conflict with the conclusion we have reached in the case under consideration. It seems that a "subsequent purchaser in good faith," within the meaning of section 14, quoted above, is one who acquires title to mortgaged property by contract with the mortgagor, or his vendee, after the execution of the mortgage, and without notice thereof; and that a purchaser of such property, sold under execution, would take it discharged of the mortgage lien, itself invalid, as against the lien created by seizure of the property under the execution, irrespective of such purchaser's knowledge of the existence of such mortgage lien. But that point is not necessary to a decision of the case before us, and we do not determine it.

The decree of the district court, giving the York National Bank a lien on the grain superior to the lien of the Farmers & Merchants Bank, by virtue of its unfiled mortgages, was right.

2. Counsel for appellant also contend that the decree appealed from is erroneous, in that it did not compel the York National Bank to credit its judgment with the value of the flaxseed pledged to secure the payment of the note on which the judgment was confessed. The court found, however, that the debt owing by Anthony to the York National Bank and unpaid was more than \$4,000; that all the flaxseed covered by all the mortgages was pledged to pay this entire debt, and that the value of all the flaxseed did not exceed \$1,500. This finding is supported by the evi-

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dence. To compel the York National Bank to apply the value of the flaxseed to a satisfaction of the execution levied on the grain, would leave the debt, now partly secured by the flaxseed, without adequate security; in fact, with a security largely insufficient to satisfy such debt. True, the York National Bank has two securities, the mortgage on the flaxseed, and the levy on the grain. It acquired these securities by a prudent compliance with the law, and if by enforcing its lien on the grain it can strengthen its other security and thus decrease its loss, I know of no rule or principle of equity that forbids it from so doing. This rule of compelling a first resort to a particular one of two funds for a creditor's benefit, who can reach but one of the funds, will not be enforced, when to do so would operate to the prejudice of the party entitled to the double fund. (*Sweet v. Redhead*, 76 Ill., 374.)

The decree appealed from must be affirmed and it is so ordered.

**AFFIRMED.**

POST, J., and RYAN, C., not sitting.

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**JESSIE JOHNSON, APPELLANT, V. SENA E. RAWLS ET  
AL., APPELLEES.**

**FILED FEBRUARY 20, 1894. No. 5493.**

**Complete Record: WAIVER: MORTGAGE FORECLOSURE.** In an action to foreclose a mortgage it is the duty of the clerk of the district court to make a complete record of the case, unless the same, or some part thereof, is waived by all parties to the suit during the term at which the decree is rendered.

**APPEAL** from the district court of Dawes county.  
**Heard below before KINKAID, J.**

*Spargur & Fisher*, for appellant.

*A. W. Orites*, contra.

NORVAL, C. J.

This is an appeal from a decree of foreclosure of a real estate mortgage. A single question is presented for review, namely, did the district court err in not directing that a complete record of the proceedings in the case be not made? The precise point was made and decided in *Colonial & United States Mortgage Co. v. Foutch*, 31 Neb., 282. In that case, which was an action of foreclosure, the plaintiff alone waived the making of a complete record by the clerk of the district court. This court construed sections 444 to 448, inclusive, of the Code of Civil Procedure and held that it was the duty of the clerk to make a complete record of the case, unless such record be waived by both parties at the term the judgment is rendered. This case falls squarely within that decision. Here the complete record was waived by the plaintiff and two of the defendants, J. L. Browne, assignee, and the Western Farm Mortgage Company. The latter was the mortgagee. The other two defendants, Sena E. Rawls and James Rawls, who were the mortgagors, did not consent to such waiver. They had a right to insist that a complete record be made by the clerk, and inasmuch as they did not waive the making thereof, the decision of the trial court was right. The judgment is

**AFFIRMED.**

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK  
OF CRETE, V. JOSEPH S. BARTLEY, STATE TREAS-  
URER.

FILED FEBRUARY 20, 1894. No. 6709.

1. **Construction of Statutes.** In construing a statute effect must be given, if possible, to every word, clause, and sentence therein. In other words, a statute should be so construed as to make all its parts harmonize with each other and render them consistent with its general scope and object.
2. **The term "several current funds,"** as employed in section 1 of the act of the legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks," construed to mean all the moneys belonging to the state in the possession or under the control of the state treasurer.
3. **Funds of State Treasury.** The subject-matter of said act, and the obvious scope and purpose of its many provisions, leave no room for doubt that the legislature intended the statute should apply alike to each of the different funds of the state treasury.
4. **Where money is deposited in a bank, on an open account, subject to check of the depositor, and not received as a special deposit, the bank agreeing to pay interest on the money, the transaction, although called a "deposit," is in substance and legal effect a loan.** *State v. Keim*, 8 Neb., 63, followed.
5. **Investment of Educational Funds.** Under section 9, article 8, of the state constitution, moneys belonging to the several permanent educational funds of the state cannot be "invested or loaned except on United States or state securities, or registered county bonds."
6. **The depositing in banks of public funds, under the provisions of the depository law, constitutes a loan and investment of the moneys so deposited.**
7. **Constitutional Law: PERMANENT EDUCATIONAL FUNDS: DEPOSIT IN BANKS.** *Held*, That the said law, in so far as it requires the depositing of the moneys belonging to the permanent educational funds of the state in banks, contravenes section 9, article 8, of the constitution, and said law is inoperative as to said funds.

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State v. Bartley.

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ORIGINAL application for *mandamus*.

*James W. Dawes*, for relator.

*W. S. Summers* and *John H. Ames*, *contra*.

NORVAL, C. J.

This is an application by the relator, the First National Bank of Crete, for a peremptory writ of *mandamus* to Joseph S. Bartley, state treasurer, to compel respondent to deposit with relator a portion of the moneys in the state treasury, according to the requirements of the act passed by the state legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks." The petition charges, in substance, that on the 9th day of January, 1894, the governor, attorney general, and secretary of state, in pursuance of the provisions of said act, designated the First National Bank of Crete as a state depository, and on said day said bank executed and delivered a bond conditioned as required by said law, which bond, and the sureties thereon, were duly accepted and approved by the proper officers; that only three other banks have complied with the provisions of said act of the legislature so as to entitle them to the deposit of state funds, and that the amount of the bonds furnished by each of said other banks was, and is, \$100,000, so that the aggregate amount which the respondent is authorized at any time to have on deposit in all of said banks pursuant to said act is \$150,000; that respondent has refused to deposit any of the moneys now in the state treasury with the relator, although requested so to do; that respondent, at the time of such demand and refusal, stated that all the moneys belonging to the state which he is empowered by said act to deposit were already deposited in the said several banks, except moneys belonging to the following funds: sinking, relief, permanent school, temporary school, permanent university, library, agricultural college endowment, normal school en-

dowment, temporary university, normal school interest, and saline. The petition further charges that respondent refuses to deposit in relator's bank any of the moneys belonging to either of the above enumerated funds, although the amount in his possession and belonging to any one of said funds, added to the amount on deposit by said treasurer with the said other banks, exceeds in the aggregate the sum of \$150,000, and that the sole reason given by the respondent for his refusal to deposit in the bank of the relator any of the moneys in the above mentioned funds was, and is, that none of said moneys are "current funds" within the meaning of the said depository law. The cause was submitted on a general demurrer to the petition.

The first question in this case is one of construction to be given to the act above mentioned relating to the deposit of public moneys in banks. Was it the intention of the legislature to require all moneys coming into the state treasury to be deposited, or only a certain portion thereof? Sections 1 and 2 of said act, chapter 50, Laws of 1891, are in these words:

"Section 1. The state treasurer shall deposit, and at all times keep in deposit for safe keeping, in the state or national banks, or some of them doing business in the state, and of approved standing and responsibility, the amounts of money in his hands belonging to the several current funds in the state treasury, and any such bank may apply for the privilege of keeping on deposit such funds or some part thereof; all such deposits shall be subject to payment when demanded by the state treasurer on his check, and by all banks receiving and holding such deposits as aforesaid, shall be required to pay, and shall pay to the state for the privilege of holding any such deposit not less than three per cent per annum upon the amounts so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law, and the rule adopted by the state treasurer for receiving and holding such deposits.

"Sec. 2. The amount to be paid by any and all banks under the provisions of this act, for the privilege of keeping public funds on deposit, shall be computed on the average daily balances of the public moneys kept on deposit therewith, and shall be paid and credited to the state quarterly on the first days of January, April, July, and October of each and every year, and the treasurer shall require every such depository to keep separate accounts of such several funds of the state as may be deposited, showing the name of each fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such funds so held."

By section 3 each bank designated as a depository under the act is required to give a bond for the safe keeping and payment of all deposits and the accretions thereof, conditioned that it will render each month to the state treasurer a statement, in duplicate, showing the several daily balances, and the amount of state moneys held by it during the month, the amount of the accretions thereof, how credited separately, and for the payment of the deposit and the accretions accruing thereon, upon the presentation of the check of the state treasurer, and also that such depository will faithfully discharge the trust and comply with the provisions of the act. The section further provides the form of the bond, names the officer with whom the same shall be deposited, and forbids the treasurer having on deposit in any bank, at one time, moneys exceeding one-half of the penalty of the bond.

Section 4 provides: "The making of profit, directly or indirectly, by the state treasurer, out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with, by loaning, depositing, or otherwise using it, or depositing the same in

any manner, or the removal by the state treasurer, or by his consent, of such moneys, or a part thereof, out of the vault of the treasurer's department, or any legal depository of the same, except for the payment of warrants legally drawn, or for the purpose of depositing the same in the banks selected as depositories under the provisions of this act, shall be deemed guilty of felony, and on conviction thereof shall be subject to punishment in the state penitentiary for the term of not more than two years, or a fine not exceeding five thousand (\$5,000) dollars, and shall also be liable under and upon his official bonds for all profits realized from such unlawful using of such funds. And it is hereby made the duty of the state treasurer to use all reasonable and proper means to secure to the state the best terms for the depositing of the money belonging to the state, consistent with the safe keeping and prompt payment of the funds of the state when demanded."

The next section prescribes the penalty for the willful failure or refusal of the state treasurer to comply with the provisions of the act.

Counsel for the relator insists that it is the duty of the state treasurer to keep on deposit in the several banks designated as depositories all money received by him belonging to the state, while the respondent contends that the moneys belonging to what is commonly known as the "general fund," a fund created for the purpose of paying the salaries of the state officers and defraying the general expenses of the state government, are the only moneys to which the depository act applies. The principal controversy in the case is as to the meaning of the term "several current funds" as used in the section first above quoted. The decisions of the courts of other states do not aid us in our investigation. In fact, we have been unable to find a law upon the statute book of any state, relating to the deposit of public moneys in banks, precisely like our own. In most of the states having a depository law the treasurer

is either required by express enactment to deposit all moneys that shall come into his hands, or else the statute specifically enumerates what funds shall be deposited in banks. Of course, the phrase "current funds," as employed in commercial transactions, has a fixed, known signification. Thus, these words as used in notes or bank checks have been frequently defined by various courts as meaning current money; lawful money; par funds, or money circulating without any discount. (See *Galena Ins. Co. v. Kupfer*, 28 Ill., 332; *Wharton v. Morris*, 1 U. S., 125; *Hulbert v. Carver*, 40 Barb. [N. Y.], 245; *Phoenix Ins. Co. v. Allen*, 11 Mich., 501; *American Emigrant Co. v. Clark*, 47 Ia., 671.) All will agree, we think, that the phrase "current funds" was not employed by the legislature in enacting the statute under consideration in the same sense in which that term is used in commercial dealings. The term "current funds," like many other words in our language, is susceptible of more than one meaning. Where a word is employed in a contract or statute which has different meanings, the sense in which it is used is to be gathered from the context. It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must receive such construction as will make all its parts harmonize with each other and render them consistent with its general scope and object. (*Follmer v. Nuckolls County*, 6 Neb., 204; *State v. Babcock*, 21 Neb., 599.) If we apply the foregoing rule in the interpretation of the law under consideration, it is not a difficult task to ascertain the legislature's intent.

It should be remembered that the moneys which come into the state treasury from time to time are, either by constitutional provision, or by legislative enactments, applicable to a variety of objects, and are divided into several separate and distinct funds, according to the sources from which they are derived and the uses to which the same may be devoted. We know at the time this law was enacted that

there were several of these funds, each having a well-understood and appropriate name, as the general fund, sinking fund, permanent school fund, and others which it is unnecessary to stop now to enumerate. It is obvious, therefore, that the words "several current funds" were employed by the legislature with reference to the various designations or divisions of the public moneys of the state. Manifestly the construction placed upon the provisions of the statute by respondent's counsel is entirely too narrow and strained, and should not obtain. To adopt it would violate the rule above stated for the construction of statutes, which requires that some meaning, if possible, must be given to every word in the act, since the construction insisted upon cannot prevail unless we attach no meaning to the word "several" in the above phrase of the first section of the law. The statute declares that "the amounts of money in his hands belonging to the several current funds in the state treasury" shall be deposited. This language was without doubt intended to apply to more than one fund. This is manifest by the use of the plural of the word "fund" and the employment of the adjective "several." It certainly could not have been the intention of the law-makers that the moneys belonging to one fund alone should be kept on deposit with some designated depository. If they did, they were very unfortunate in the use of language. Had it been the intention of the legislature that the act should apply to a single fund, it is fair to assume that language which could not be misunderstood would have been employed to express such purpose. But it is said that the word "current," in the connection in which it is used with the word "funds," indicates that the moneys which the law-makers intended are those raised by taxation, and which are devoted to defraying the current expenses of the state government by disbursements from what is known as the "general fund," and in the same connection reference is made to the definition of the word

“current.” In the Century Dictionary it is defined thus: “Running; moving; flowing; passing; present in its course; as, the current month or year.” Other standard authorities give the word about the same definition. Assuming that the word was employed by the legislature in the sense indicated, yet the interpretation contended for by respondent is not permissible. While the amount of money belonging to the general fund of the state is continually changing or fluctuating, caused by the paying of the revenues derived from taxation into the treasury, and by their being disbursed, it is likewise true that the amount in each of the other different funds in the treasury is constantly changing, as the records kept by the treasurer and auditor, respectively, will disclose, and of which public records this court is bound to take judicial notice.

We do not entertain a doubt as to the sinking fund, relief fund—which is also a sinking fund, and the permanent educational funds, the moneys in each of which, counsel strenuously insist, are not “current funds” within the meaning of the law. The sinking and relief funds, now aggregating about a quarter of a million of dollars, consist of moneys derived from taxes levied for the purpose of paying the interest on outstanding bonds issued by the state, and for the purpose of paying the principal of said bonds when they become due. The moneys constituting these two funds are collected and paid into the treasury, from time to time, precisely the same as the taxes are collected and paid into the general fund. The interest on one set of the bonds is paid by the state treasurer annually and the other semi-annually.

The permanent school fund, permanent university, normal school endowment, and agricultural college endowment funds constitute the permanent educational funds of the state. The permanent school fund is composed of the proceeds of the sale of land by the state, and of the redemption of United States and state securities and county bonds

belonging to said fund, and of escheated estates, and a five per centum granted by congress on the sale of government lands in the state. Each of the other educational funds is composed of the proceeds of lands which have been set apart for that purpose and sold by the state, and the redemption of securities belonging to said funds respectively. Each of these several funds is continually augmented by moneys received from the sources indicated, and the moneys therein are diminished from time to time by the making of investments for the benefit of said funds. Hence, the several educational funds are "current funds" in the sense in which that term is used in the law, if the moneys composing the general fund fall within the definition, and all concede that the law applies to the fund last named. In the language of counsel for relator, "For the purpose of the business of a great state all funds are current funds so long as they remain on hand, or not invested. Shall we, by the use of jugglery of language, extend the provisions of this law to the pittance of the general fund, as we often find it, and deny them to the sacred trust funds of the state?"

\* \* \* These trust funds are current, in that they should have, and in that they demand, constant attention, hourly, daily, all the time, looking to their profitable, permanent investment. These trust funds are current, moving, and changing funds, increasing and diminishing."

In respect to two of the other funds of the state treasury, the temporary school and temporary university, which aggregated at the close of the last year more than \$360,000, it may be observed that the former is derived from a tax levied and collected at the same time as other state taxes for the support of the common schools of the state, together with the interest and rentals accruing from the sale and lease of school lands, and the interest received from the investments made for the benefit of the permanent school fund. The temporary university fund is supplied from a tax levied for the support of the state university, which is

likewise paid at the same time other taxes are collected, and by moneys received from the interest and rentals of lands belonging to the university endowment fund, sold and leased by the state, together with the interest on securities belonging to said fund, and tuition fees. The moneys composing the temporary school and temporary university funds are paid into the state treasury as often as the moneys constituting any other fund of the state are paid in, and more frequently than the moneys belonging to the general fund. The moneys composing the temporary school fund are apportioned among the counties every six months, and are paid upon warrants upon the state treasury drawn by the auditor. The moneys belonging to the temporary university fund are disbursed from time to time upon the auditor's warrant. Both of these are moving funds, so to speak, and the balances therein are constantly increasing and diminishing.

There is no word or provision in the act we are discussing which directly in terms, or by fair implication, limits the operation thereof to the moneys of the state belonging to one fund more than another. On the contrary, the subject-matter of the act, and the obvious scope and purpose of its provisions, conclusively show it was the intention of the legislature that the statute should apply to all funds of the state alike. An examination of the provisions of the second and fourth sections of the law strengthens this conclusion. By the second section it is made the duty of every bank designated as a depository "to keep separate accounts of such several funds of the state as may be deposited, showing the name of the fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such fund as held." There is no ambiguity in this provision. Plainer language could

not have been used. It shows that the moneys in the several funds were to be deposited, and that the depositary should keep a separate account with each fund. The fourth section, which we have quoted above, makes it the duty of the state treasurer to make every reasonable effort to secure to the state the best terms for the depositing of "the money belonging to the state," and it is also made a felony for such officer to make any profit out of any money in the state treasury belonging thereto, by loaning, depositing, or otherwise using or disposing of it; and the removal of such money, or a part thereof, by the treasurer, or with his consent, out of the vaults of the treasury, or any legal depository, except for the payment of warrants, or for the purpose of depositing in the banks legally selected as depositories, is also declared a felony. Whether or not this section is legal and valid as a criminal statute is not now involved and will not be decided. Its consideration, however, tends to show the purpose and object of the legislature in enacting the law, and that the power to deposit all the moneys in the state treasury for the benefit of the state was meant to be conferred, and we think it has been, in plain terms, so far as the legislature possessed the power to do so.

This brings us to the consideration of another question, and that is, whether the act which we have been considering is unconstitutional in so far as it requires the deposit in banks the moneys in the treasury belonging to the several educational funds of the state. Section 9 of article 8 of the constitution of Nebraska reads as follows: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned except on United States or state securities, or registered county bonds of this state; and such funds, with the interest and income

thereof, are hereby solemnly pledged for the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." The foregoing provision prohibits the loaning or investing of any moneys belonging to any of the permanent educational funds of the state, "except on United States or state securities, or registered county bonds of this state." The moneys in these several funds the constitution has impressed with a trust character, and the legislature is powerless to authorize them to be devoted to any purpose not within the scope of the constitutional provision quoted. Does the statute attempt to authorize the loaning or investing of these trust funds? Counsel for relator contends that it does not; that it merely requires their deposit temporarily for safe keeping, pending need for use or opportunity for permanent investment. This construction would be a reasonable and proper one if the deposit contemplated by the statute was a special one merely for safe keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant. If it was, the purpose is not indicated in the title of the act, since it makes no reference to the safe-keeping of the funds deposited in banks. It is manifest, from an examination of the entire act, that a general deposit of the funds was what the framers intended. True, the first section declares that "the state treasurer shall deposit, and all times keep in deposit for safe keeping," in the banks that shall be designated as depositories, the moneys in his hands belonging to the several current funds, subject to payment on the treasurer's check; but further along, in the same section, the bank receiving and keeping such deposit is required to pay the state not less than three per cent per annum upon the amounts so deposited; and the next section provides, among other things, in substance, that the interest shall be computed on the average daily balances of the public moneys kept on deposit. While the statute mentions "safe keeping," when

the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. Whoever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state. A deposit of state funds, under the provisions of the law, amounts to a loan or investment of the funds so deposited.

As was said by Mr. Justice Miller in his opinion in *Marine Bank v. Fulton Bank*, 2 Wall. [U. S.], 256, "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand."

The decisions are quite uniform to the effect that where money deposited in a bank is passed generally to the credit of the depositor, the relation of debtor and creditor is thereby created, and the transaction, although called a "deposit," is nevertheless in substance and legal effect a loan, and this though it is payable on demand. (*Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 100; *Perley v. County of Muskegon*, 32 Mich., 132; *State v. Executor of Buttles*, 3 O. St., 309; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y., 82; *Lowry v. Polk County*, 51 Ia., 50; *Long v. Emsley*, 57 Ia., 11; *In re Franklin Bank*, 1 Paige Ch. [N. Y.], 249; *Wray v. Tuskegee Ins. Co.*, 34

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Ala., 58; *Bank v. Jones*, 42 Pa. St., 536; *Knecht v. United States Savings Institution*, 2 Mo. App., 563.)

In *Foley v. Hill*, 2 H. L. Cases [Eng.], 28, Lord Chancellor Cottenham said: "Money when paid into a bank ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor."

The Ohio case was this: The Ohio canal fund commissioners deposited with the Columbus Insurance Company \$100,000 of the money and funds of the state, belonging to the canal fund, and in consideration of which the company gave a bond, signed by various persons, to repay the

same in two years with seven per cent interest thereon per annum, payable annually. In an action by the state upon the bond, the court held that the advancement of the money to the insurance company was a loan, although the bond denominated the receipt of the money as a "deposit."

In *State v. Keim*, 8 Neb., 63, this court held that the deposit of state moneys by a state treasurer in a bank was a loan in its legal effect. This case was cited with approval in *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431.

It is urged that the Nebraska cases cited do not apply to the questions here at issue, since at the time they arose no law was in existence which required the deposit of public funds in banks, while now the treasurer is not only authorized to deposit them for safe keeping, but he is expressly commanded to do so. We are unable to see the force of the argument. The fact that the legislature has enacted that state moneys shall be deposited in banks does not make the placing of the funds therein any the less a loan than had they been deposited without sanction of law. On the contrary, it would seem that the two cases decided by our own court are the more valuable as precedents for our now holding that such a transaction amounts in law to a loan, since we have a statute which authorizes the deposit of public funds, and in every case of deposit, this statute enters into and forms a part of the contract.

Connecticut has a statute which declares that where the real estate of a married woman has been sold and the proceeds thereof "secured or invested in her name, or in the name of a trustee for her benefit, the same shall \* \* \* not be liable to be taken on execution for the debts or liabilities of her husband." The supreme court of that state, in *Jennings v. Davis*, 31 Conn., 134, held that where the money received by the wife from the sale of her lands is deposited in her name in a bank, it is invested within the meaning of the statute. Sanford, J., in deliv-

ering the opinion, observes: "It is not stated whether the money was deposited in the bank for safe keeping merely, or in the character of a loan to the bank for which a stipulated rate of interest was to be paid during its continuance there; nor is it material to inquire, because, in either case, the deposit (being a general as contradistinguished from a special one) created a debt in favor of the depositor and against the bank, and then the money became 'invested' in that debt, and being thus invested in the name of Mrs. Morehouse was protected by the statute against her husband's claims upon it. \* \* \* It can make no difference whether the depositor took any written evidence of this investment or did not. The statute does not require any particular species of evidence that the investment has been made; it only requires that it should be made in her name, or in the name of a trustee for her benefit. Money loaned is 'invested' in a debt against the borrower. If a promissory note is taken for it in the lender's name, the note becomes the evidence of the investment and secures it to the lender. If no note is taken, the money is nevertheless 'invested' in the debt against the borrower and in the lender's name."

The conclusion is irresistible that the framers of the law under review contemplated that the moneys deposited in pursuance of the provisions thereof should be retained by the bank receiving the same for an indefinite period of time and be used and loaned by it as its own, the bank being under obligation to repay the amount so deposited on the presentation of the check of the state treasurer. There is no room for doubt that where money is deposited under this act, the bank receiving the same is not a bailee, which would be the case if the title to the money remained in the state after the same was received by the bank. Prior to the adoption of the present statute there existed in this state no law authorizing or requiring the deposit of public funds in banks. It was, however, generally understood that each

of the former state treasurers had loaned the state funds to various banking institutions of the state for his own pecuniary benefit. The state received no income from such use of its moneys, and it was to remedy this that the depository law was enacted, rather than to provide for the safe keeping of the moneys belonging to the state treasury. The clear and manifest object of the statute was to enable the state to receive interest on its funds deposited in banks. The transaction contemplated by the statute is as much a loan or investment of the moneys deposited under its provisions as where a bank loans its moneys on the note of its customer; and if this law can be upheld, so far as it relates to the depositing of the permanent educational funds in banks, then there is nothing to prevent the legislature from enacting a law authorizing the loaning of the educational or trust funds to its citizens with or without security for the repayment thereof; and all will agree that such a law, if enacted, would contravene the section of the constitution above quoted. But it is said that the constitution does not say that these educational funds shall not be temporarily deposited in banks until opportunity for their permanent investment is presented. That instrument in express terms forbids their being "loaned or invested" except in a certain manner, and, as we have already attempted to show, the depositing of these moneys in banks on open account drawing interest, although deposited temporarily, constitutes a loan and investment of the money. The fact that a person borrows money for an indefinite period, payable on demand of the lender, does not make the transaction any the less a loan than if the money had been taken for a fixed, long period of time. The same is equally true as regards the depositing of money in banks. The length of time the money is left does not determine whether the transaction is a loan or not. We are satisfied, both from reason and upon authority, that the depositing of the moneys belonging to the permanent educational fund of the state in banks under

the provisions of the depository law is, in effect, a loan and investment of the funds so deposited, and is, therefore, inhibited by the constitution. We do not wish to be understood as in the least intimating that the legislature is powerless to enact a law requiring the state treasurer to deposit the moneys belonging to these funds in a bank or banks for safe keeping merely. Perhaps it has that power, but such is not the scope and effect of the law before us, since it requires a general deposit of the funds and not a special deposit, where the identical moneys deposited are to be returned. The amount of uninvested moneys belonging to the several permanent educational funds of the state is large, and opportunities for the permanent investment of these moneys in the class of securities and bonds described in the constitution are daily becoming less frequent, so that the amount in the treasury belonging to these trust funds is constantly increasing. That they should be invested so that they will yield an income to the state, no one will deny; but the remedy, in part at least, must come through an amendment of the constitution. The courts cannot, under the guise of interpretation, extend the powers conferred by the constitution beyond the scope of its provisions.

We have not considered, nor do we now determine, whether the relator has such an interest as entitles it to maintain the action, since its right to do so has not been raised or argued by counsel. As the state at large is directly interested in the enforcement of the depository law, the attorney general could, and doubtless it is his duty to, institute proceedings to compel the depositing of the funds in the banks designated as depositories; and perhaps a bank which has complied with the law might do so, at least in case the attorney general should refuse to appear and file the application. As it is important to the public interests that the real questions involved in this controversy should be determined and set at rest, we have thought it necessary

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to pass upon the merits of the case, without going into the question of who should have instituted the proceedings. It follows, from the views expressed in this opinion, that the demurrer to the application should be overruled and a peremptory writ of *mandamus* allowed.

WRIT ALLOWED.

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RASMUS P. JENSEN ET AL., APPELLEES, V. LEWIS INVESTMENT COMPANY, APPELLANT, ET AL.

FILED FEBRUARY 20, 1894. No. 5236.

**Principal and Agent: SUFFICIENCY OF EVIDENCE.** The evidence in the case examined and considered, and *held* to sustain the finding of the trial court that S. was the lender's agent in negotiating the loan, and not the borrower's, and that the loss resulting from the failure of S. to pay over the money to the borrower, delivered to him for that purpose by the lender, falls on the latter.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*Howard B. Smith*, for appellant.

*Morris & Beekman*, contra.

NORVAL, C. J.

The appellant, the Lewis Investment Company, is a corporation organized under the laws of the state of Iowa and engaged in the business of making loans upon real estate security, its principal place of business being at Des Moines. Rasmus P. Jensen made an application to the investment company for a loan of \$1,200 on certain real estate owned by him and situate in the city of Omaha. After receiving

notice that the application was accepted, he, with his wife, Mary Jensen, executed and delivered to said company two mortgages covering said real estate, one for the sum of \$1,200, due in five years from date thereof, with seven per cent interest, payable semi-annually, and the other for the sum of \$60, payable in ten equal payments. Both mortgages were duly recorded in the office of the register of deeds of Douglas county. Subsequently, Jensen sold and conveyed the premises to Ole Oleson, warranting the title against incumbrances. About two years afterwards, Rasmus P. Jensen and Ole Oleson brought this action in the court below to cancel the mortgages, alleging in their petition, as a ground therefor, that the investment company had not paid to Jensen, nor to any one for him, the money agreed to be loaned, but had wholly failed and refused to pay the same, or any part thereof, and that it refused to surrender said mortgages or to discharge the same of record. The investment company filed an answer and cross-petition, making Mary Jensen a party defendant, praying a foreclosure of the mortgages. Upon the hearing the district court found the issues in favor of the plaintiffs, and rendered a decree in accordance with the prayer of the petition.

For convenience we shall hereafter designate Rasmus P. Jensen as "plaintiff," and the Lewis Investment Company as "defendant."

The record discloses that one L. A. Stewart, on and prior to March 17, 1887, was engaged in the loan business in the city of Omaha, and had submitted numerous applications for loans to, and procured loans to be made by, defendant and other loan companies. On the date aforesaid plaintiff applied to Mr. Stewart for a loan of money, and signed and left with him a written application for a loan of \$1,200, which application was forwarded by mail by Stewart to the company at Des Moines. In due time the application was approved, papers were prepared by defendant and sent to Stewart, which were subsequently executed by plaintiff.

The money to pay out on the loan was given by the defendant to Stewart, and it is undisputed that the latter never paid any part of the \$1,200 to the plaintiff, but absconded without accounting for the same to the defendant.

The only question presented for consideration is: Was the payment of the money to Stewart, in law, a payment to the plaintiff? In other words, was Stewart the agent of the plaintiff in negotiating the loan and receiving the money? A consideration of the evidence in the record satisfies us that the answer should be in the negative, and that the defendant should bear the loss occasioned by Mr. Stewart's dishonesty. That Stewart for a long time prior to the transaction in question had been the agent of the defendant in negotiating loans for it in the city of Omaha there is no room for doubt.

George P. Russell, who was Mr. Stewart's clerk and had charge of his loan office, testified as to the manner in which the business was conducted, as follows:

Q. Were you familiar with the method of transacting business between L. A. Stewart and the Lewis Investment Company?

A. Yes, sir.

Q. State to the court the manner of conducting the business between them.

A. You refer to his negotiating loans?

Q. In regard to this loan business, you say they were in correspondence?

A. Yes, sir.

Q. State the manner of conducting this business.

A. Well, sir, we received the application for a loan on one of the Lewis Investment Company's blanks, which we furnished the party making the application. We then made an examination of the property, procured an abstract and forwarded it to the Lewis Investment Company for their approval. If approved, we received draft, mortgages, notes, and instructions from the company.

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Q. Did you have an appraisal made?

A. Yes, sir; that is provided for in the blank.

Q. When was that made?

A. Made before the papers were submitted to the investment company.

Q. Who chose the appraisers?

A. As a general thing, Stewart. If he didn't, the investment company did.

Q. Where were the mortgages made out and prepared?

A. At the office of the company in Des Moines.

Q. What rates were they getting at that time?

A. Their rate was eight per cent.

Q. That is, eight per cent per annum?

A. Yes, sir.

Q. During the course of the loan?

A. Yes, sir.

Q. Usually for five years?

A. Yes, sir.

Q. Two mortgages were made out, were they not?

A. Yes, sir.

Q. The principal mortgage was to secure the principal amount of the loan, was it not?

A. Yes, sir.

Q. What rate of interest would that mortgage draw?

A. If the loan was eight per cent, as a general thing, the first mortgage was made at six per cent.

Q. How was the other two per cent evidenced?

A. By a second mortgage, which ran sometimes one, two, or five years, as agreed.

Q. Who filed these mortgages with the register of deeds?

A. L. A. Stewart.

Q. Was there any custom as to the order in which these two mortgages were filed?

A. The instructions were to file the first mortgage first.

Q. So it would show on the record that it was the prior of the two mortgages?

A. Yes, sir.

Q. What commissions did L. A. Stewart get for doing this business?

A. There was a general understanding on eight per cent mortgages that two per cent of the face of the mortgages was to be the commission to be paid by the Lewis Investment Company to L. A. Stewart—two per cent of the face of the loan.

Q. When were these commissions paid?

A. They were paid at different times; as a general rule, once a month.

Q. Were they paid with each loan or at stated periods?

A. Sometimes the draft was made out to include commissions; sometimes not. It might be left for several loans to accumulate and paid then or whenever it was asked.

The Court: State whether the borrower ever paid Mr. Stewart the commission outside of these papers.

A. No, sir.

Q. Mr. Davis: What was the usual custom in making these second mortgages as to whom the second mortgage ran?

A. I am inclined to think, as a general rule, to the investment company.

Q. You spoke of the second mortgage being equal to two per cent for the entire term of the loan?

A. Yes, sir.

Q. In a five year loan it would be ten per cent of the principal sum.

A. Yes, sir.

Q. You spoke of the Lewis Investment Company paying two per cent of the face of the mortgage to Mr. Stewart?

A. Yes, sir.

Q. Was that the rule in loans for shorter period than five years?

A. I think that rule applied to loans in general. That

was the general understanding. Loans as they were made were made on certain terms.

The testimony of the witness Russell is not contradicted by any officer of the defendant, although George H. Lewis, the president, and Robert P. Maynard, the secretary of the investment company, were both examined as witnesses on the trial. Mr. Lewis in his testimony states that he was acquainted with Mr. Stewart, and knew him while he was a resident of Des Moines, which was before his removal to Omaha; that witness declined to appoint Stewart agent, but admits that he requested him to send in applications for loans, and that the defendant had made about one hundred loans on applications taken by Stewart; that the latter in every case gave his opinion as to the desirability of the loan, and in some instances they were made on his recommendation and approval without an examination of the real estate offered by the borrower as security. The witness further testified: "We make it an imperative rule that no one shall represent himself as agent of the Lewis Investment Company in any way, or publicly advertise himself as such. Mr. Stewart asked us to permit him to advertise himself as our agent in 1886, but we refused him. We have refused it to Messrs. Muir & Gaylord of this city. This is our universal custom and practice in all our business."

The record further discloses that about a year after Stewart began to procure applications for the defendant he was required to, and did, give a bond to the investment company in the sum of \$10,000, signed by two sureties, conditioned as follows:

"Whereas, the said L. A. Stewart is engaged in the business of negotiating and making loans secured by mortgage upon real estate in the city of Omaha and in the county of Douglas, outside the city of Omaha and in other portions of the state of Nebraska;

"And whereas, in the course of said business, acting as

the agents of various parties desiring such loans, it is his practice to send applications to said Lewis Investment Company, and if such loans are accepted by them to forward the note or notes and mortgages securing the same, duly executed, to said company, and receiving from them in return the funds to fill the loans for which said Stewart makes drafts upon said Lewis Investment Company, or receives from said company such drafts, the same to be applied in payment of any mortgage or mortgages already upon the property securing said loans, or any mechanics' liens or unpaid bills for lumber or materials of any kind constituting a valid claim against any such real estate, paying the balance, if any, to the respective parties who have obtained such loans and made such notes and mortgages above referred to:

“Now, therefore, the condition of this obligation is such that if the said Stewart shall well and truly pay any and all funds received from such loans to the parties entitled thereto, and mortgage above referred to, and shall apply said funds in payment of any prior incumbrances existing on any piece of property upon which a loan is made by said Lewis Investment Company, so that the mortgage securing their loan shall be the first lien, except the current taxes, then, and in that event, this obligation shall be null and void, otherwise to be in full force and effect; it being the intent of this obligation to protect any person who may apply to said Stewart to procure him a loan through said investment company from any harm or loss by reason of any negligence or any wrongful act on the part of said Stewart, or any one in his employ, in the transaction of the business above referred to, including also the purchase and sale of real estate purchase-money mortgages, so called. But nothing in this bond contained shall be construed as constituting said Stewart the agent of said Lewis Investment Company, or as giving him any authority to bind them by any contract, expressed or implied.”

If Stewart was agent of the borrower merely, as the defendant now contends, why was this bond required? Such action cannot be reasonably explained upon any other theory than that Stewart was the agent of the defendant, and that the bond was taken to protect the company against loss resulting from the agent's acts. Counsel for appellant calls attention to the clause in the bond to the effect that the instrument should not be construed as constituting Stewart as agent of the obligee therein named. If the defendant believed that the other provisions in the bond did not constitute Stewart its agent, why was the clause referred to inserted expressly disclaiming such agency? Doubtless the defendant hoped thereby to escape any responsibility for Stewart's acts, although it availed itself of the benefits of the agency. We decline to place a construction upon the instrument that would lead to the result indicated. The conditions contained in the bond established that Stewart was the agent of the lender, and the clause under consideration, especially in view of the entire course of dealing between the parties, should not be held as releasing the defendant from the responsibility which the law imposes upon a principal for the acts of his agent, so far as third parties are concerned. But, independent of the bond, the evidence establishes that the relation of principal and agent existed between Stewart and the defendant. It is uncontradicted that all applications for loans were taken on the defendant's printed blanks furnished by it to Stewart. The latter examined the property upon which each loan was made, and in every instance made a recommendation as to the value of the security. All mortgages and notes were prepared by the defendant and sent to Stewart, who, after procuring the same to be executed by the borrower, filed the mortgages for record. The money to pay out on the loan was sent to Stewart, who was required by the defendant to, and he did, pay out of the same all existing liens on the property, and the balance of the money

remaining, if any, he turned over to the borrower. All commissions on the numerous loans negotiated for the defendant were invariably paid by it to Stewart. These facts are entirely inconsistent with the theory advanced that the latter was the agent of the borrower merely. On the contrary, they establish beyond question that he represented the lender. An examination of the many letters, which passed between Stewart and the company, strengthens this view. Copies of more than seventy-five of the letters are incorporated in the bill of exceptions, the following being a fair selection from those written by defendant :

**"DES MOINES, IOWA, Nov. 13, 1886.**

“*Messrs. Stewart & Co., Omaha, Neb.*—DEAR SIR: We received your favor of the 9th inst. inclosing the Inez Christensen bond November 1 for \$900, with abstract of title and commission notes of \$31.50. We hand you herewith N. Y. exchange for \$900. When you send us the mortgage please also send the insurance policy for \$1,850 as called for by the terms of the loan.

**“ We also enclose you N. Y. exchange in your favor for \$68, being the balance due on the Wm. Gibson loan. This, as we wrote you, was sent by mistake to a party in the east and has just been returned to us.**

**"We also send you N. Y. exchange for \$20 to cover the rebate due you on the McNair loan.**

**“Find herewith the Inez Christensen application made out on our form. Please have this signed and have two appraisers value the property as usual, and return to us the other papers.**

“ We also send you a lot of our subrogation slips, which we would ask you to have attached to all policies connected with loans made for us before these policies are sent on. This will save us much trouble.

**"Yours truly,**

**LEWIS INVESTMENT Co.,**  
**"ROB'T MAYNARD, Sec."**

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"DES MOINES, IOWA, Nov. 16, 1886.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: We herewith hand you N. Y. exchange for \$40, being the rebate allowed you on the Gibson \$2,000 loan. This was overlooked when we sent you the McNair rebate. Please acknowledge receipt.

"Yours truly,      LEWIS INVESTMENT CO.,  
"ROB'T P. MAYNARD, Sec."

"DES MOINES, IOWA, March 9, 1887.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: Mr. R. E. Gaylord of your city has taken a block of the stock of our company, and we have agreed with him that he shall have the control of our business in Omaha and that vicinity. We should, however, be very glad to receive any applications which you may have and would recommend, but in accordance with the arrangements entered into with Mr. Gaylord, they should come to us through his office. You can make such arrangements with him in this connection as you and he may agree upon. We would assure you that we have been well pleased with all your efforts in our behalf, and with the loans which were sent to us, and it is from no dissatisfaction with you that we have taken this step. We will hope that in the future we may continue to receive the benefits of your active and wide-awake business tact.

"We would be obliged if you were to send us in a statement of what rebates may be due you on the various loans made through you since our last settlement. There are various matters in connection with them, such as insurance policies, perfecting of the abstracts, etc., which are not yet completed. As soon as these matters are closed up in each case we will remit what is due you.

"Yours truly,      LEWIS INVESTMENT CO.,  
"ROB'T P. MAYNAND, Sec."

"JUNE 14, 1887.

"*Mr. L. A. Stewart, Omaha, Neb.*—DEAR SIR: Refer-

ring to the various loans which have been negotiated for us by you, there is insurance still needed as detailed on the various loans specified. [Then follows a list of the loans.] All of these loans bear date of several weeks or months back and we cannot understand why the insurance has not been furnished us before. Please stir around and poke up the various parties and send us on the insurance in some first-class company without further delay.

“Yours truly,           LEWIS INVESTMENT Co.,  
                                  “ROB'T P. MAYNARD, Sec.”

Under date of February 9, 1887, the defendant, in reply to a letter written by Mr. Stewart enclosing the application of Barney Calelly, says: “We conclude to make the papers and send to you, but we will fill the loan only upon condition that some one from your office shall go and personally inspect the property, and give us a full and careful report and estimate of value. We are afraid the loan is too heavy. Would rather cut it down to \$2,000 or \$2,200, than complete it at this figure. We shall require first-class eastern insurance on the loan, particularly if made at this amount. If possible, I would rather you would go personally to look at the land, as Russell, I think, is a little inclined to be enthusiastic, and to overrate values. Perhaps I am mistaken on this point.”

No disinterested person can peruse the whole correspondence between Stewart and the defendant without being convinced that the former was the agent of the latter in the negotiation of loans and in paying out the moneys thereon to the borrower. The manner in which the business was conducted is not susceptible of any other reasonable interpretation than that Stewart was in fact the defendant's agent, and was so considered by the company.

But it is urged that the relation of principal and agent ceased on March 9, 1887. If the agency terminated on that day, and Stewart acted for the plaintiff merely in negotiating the loan in question, then Jensen must bear the

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loss occasioned by the failure of Stewart to pay the money over to him. The letter written by the investment company, bearing date March 9, a copy of which appears above, is relied upon to support the defendant's contention. This letter does not in express terms revoke the agency, nor does it contain language from which such an inference must necessarily be drawn. True, it states that Mr. Gaylord is to have the control of the defendant's business in Omaha and vicinity; but we think the proper construction to be placed upon this language, when taken in connection with the remainder of the communication, is that Stewart was not superseded by Mr. Gaylord, but that the latter had the general management of the defendant's business in Omaha, and that the applications thereafter taken by Stewart should pass through Mr. Gaylord's hands. It will be observed that the letter states: "We should, however, be very glad to receive any applications which you may have and would recommend. \* \* \* We will hope that in the future we may continue to receive the benefit of your active and wide-awake business tact." This does not indicate that the defendant expected Stewart to cease negotiating loans for it. The contrary idea is conveyed. Plaintiff's application was taken on one of the defendant's printed blanks and was forwarded by him to the company direct after March 9, the letter transmitting the application reading as follows:

"MARCH 22, 1887.

"*Robert P. Maynard, Sec'y, Des Moines.*—DEAR SIR: I enclose application and contract for \$1,200 loan to Rasmus P. Jensen. Been expecting Mr. Gaylord home, but as he is away we send it to you, but the commission should be credited to his account.

"The application speaks for itself, and I think is a safe loan. I inspected the property personally on the 17th, and found it about as represented, and should consider \$5,000 a low valuation.

"Truly yours,

L. A. STEWART.

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"P. S.—The cable line is already in front of said premises. Property is selling at about \$100 per front foot in the neighborhood."

To the above letter the defendant, under date of March 23, replied as follows: "Referring to the Rasmus P. Jensen \$1,200 application, we will accept the same subject to Mr. Gaylord's approval, and forward you papers herewith for their usual course. We, of course, will want to see the abstract and examine the same before the money is paid out on the loan. We also return the Jensen application so that you can fill, in the same handwriting, the description of the property."

It appears from the testimony that plaintiff's application took precisely the same course, and that the loan was made through Stewart in the same manner, as had been the custom in making loans prior to March 9, except that Mr. Gaylord approved the loan. The Jensen papers were sent to Stewart for him to have executed. He filed the mortgages for record, and the money was paid to him by the defendant to close the loan. The only thing Mr. Gaylord had to do with the transaction was to approve the application. If the defendant believed that the latter was its sole agent at Omaha, why were not the Jensen papers and the money to pay out on the loan sent to Mr. Gaylord? The failure to do so is convincing proof that the company regarded Stewart as its agent in the transaction, which in fact he was.

It is disclosed that the plaintiff, at the time of his making the application for the loan, also signed a writing addressed to L. A. Stewart, which states: "I hereby appoint you my agent and attorney to negotiate for me a loan of \$1,200, with interest at eight per cent per annum, payable semi-annually." This paper also recites: "I authorize you to procure an abstract of title to said premises. And I hereby agree, in consideration of your services in the negotiation of said loan, to pay you or the assignee of this

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contract a commission of — per cent on the amount loaned, the actual cost of abstract of title, and for perfecting the same, and also recording the mortgage, \* \* \* and my said attorney is hereby instructed and authorized to pay off and discharge all existing liens on the above described land with the proceeds of the loan applied for, paying me the balance after deducting the above named commissions and charges, and the money advanced to pay off existing liens. \* \* \* I farther agree that this contract may be assigned to any person or persons from whom my said agent may procure this loan." Counsel for appellant insists that the foregoing writing, which we will hereafter call a contract, constituted Stewart plaintiff's agent to negotiate the loan for him and to receive the money. It is evidence tending to prove that the relation of principal and agent existed, and it would be conclusive upon that point if there were no other proof in the record upon the subject. But there is other evidence. It is shown that it was the usual custom of the defendant to require all applicants for loans to sign a similar agreement to the one before us, and said contracts were invariably forwarded to the defendant with the applications. That was done in this case. The application signed by plaintiff in express terms authorized the defendant to secure the loan for him. It recites: "The undersigned hereby authorizes the Lewis Investment Company, of Des Moines, Iowa, to procure for me a loan of \$1,200 for five years, to bear interest at eight per cent per annum, payable semi-annually. \* \* \* All incumbrances will be removed before the completion of this loan. \* \* \* I will furnish a complete abstract of title to said realty, showing the record of the above mortgage as the first lien on said premises." The application has this indorsement: "Negotiated by the Lewis Investment Company, 316 West Fifth street, Des Moines, Iowa." Plaintiff is not estopped by the provisions contained in the above writing or contract from showing that

Stewart was not his agent. The question of agency must be determined from all of the testimony in the case. This point is sustained by the decisions of this court in *Olmsted v. New England Mortgage & Security Co.*, 11 Neb., 487, and *New England Mortgage & Security Co. v. Addison*, 15 Neb., 335.

It appears that when the application for the loan was made there was a valid mortgage of record on the premises in favor of one Byron Reed for the sum of \$500, and although the contract recites that Stewart is authorized to pay off all liens out of the proceeds of the loan and procure an abstract of title, the proofs fail to show that he did either. On the contrary, the Reed mortgage was paid by the plaintiff on March 31, 1887, which was before the money was paid to Stewart. Defendant must have been aware of the existence of the mortgage given to Mr. Reed when it paid over the money to Stewart, since the lien was shown upon the abstract which had been furnished it. Appellant not having been apprised of the release of the mortgage, it is unreasonable to suppose that it would have paid the \$1,200 to Stewart had it not regarded him as its own agent in the transaction, and that with the money he would discharge the mortgage. It is not usual or business-like for a lender to trust the agent of the borrower to pay off existing liens upon the property out of the money loaned. Plaintiff did not know the contents of the paper when it was signed. He only applied for one loan, and evidently did not intend to constitute both Stewart and the defendant as agents to procure the money for him. We are satisfied the contract was a mere device, obtained for the same purpose that the clause was inserted in the bond given by Stewart, to the effect that it should not be construed as constituting Stewart the agent of the investment company, namely, to enable the defendant to escape liability for the acts of its agent. The application and contract should be construed together, and in the light of the prior

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and subsequent dealings between Stewart and the defendant. So construing them, we are forced to the conclusion that the trial court was justified in holding that Stewart was the agent of the defendant for the purpose of disbursing and paying over the money to the plaintiff, and that he was not plaintiff's agent in the transaction. Defendant paid the money to Stewart at its peril, and must stand the loss. The judgment is

**AFFIRMED.**

39	386
44	279
39	386
46	143
39	386
148	416
48	483

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**M. D. HOY V. LEWIS ANDERSON.**

FILED FEBRUARY 20, 1894. No. 5094.

1. **Homestead: VALUE.** The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein.
2. **Lien of Judgment Upon Homestead.** A owns 160 acres of land in this state, of the value of \$2,800, upon which he resides with his family as a homestead. There is a valid mortgage upon the premises to secure the payment of \$1,200, no part of which sum has been paid. Subsequent to the giving of the mortgage, but while the land was occupied as a homestead, two judgments were obtained against A, transcripts of which were duly filed in the district court of the county in which the real estate is situated. *Held*, That the judgments are not liens upon said premises.

ERROR from the district court of Polk county. Tried below before MILLER, J.

*Albert & Reeder*, for plaintiff in error:

The extent of the homestead is to be determined by the value of the land, and not by the value of the claimant's interest therein. (*Yates v. McKibben*, 66 Ia., 357; *Raber v. Gund*, 110 Ill., 589.)

*J. L. Makeever* and *E. L. King, contra*, cited: Thompson, Homestead & Exemption, secs. 656-663; Boone, Law of Mortgages, p. 319; *Quinn's Appeal*, 86 Pa. St., 447; *Hill v. Johnston*, 29 Pa. St., 362; *Vermont Savings Bank v. Elliott*, 18 N. W. Rep. [Mich.], 805.

NORVAL, C. J.

Defendant in error commenced an action in the court below against Samuel Maxwell and M. D. Hoy, for the purpose of having two judgments declared not to be liens upon certain premises claimed as a homestead. Defendant in error Lewis Anderson is now, and has been for ten years last past, a married man, and the head of a family, residing in Polk county, this state. For three years prior to the instituting of this action he has owned and occupied as a homestead the following real estate, to-wit: The northwest quarter of section 1, township 15, range 3 west, containing 160 acres, and no more, which premises do not exceed in value \$2,800. There is now, and has been for three years past, a mortgage on said real estate amounting to \$1,200, leaving the equity of Anderson in said quarter section not to exceed the value of \$1,600. Subsequent to the recording of the mortgage, Samuel Maxwell recovered a judgment against Anderson and others in the county court of Merrick county for \$163.16 and \$11.50 costs, and on the 15th day of December, 1888, a transcript of said judgment was filed in the office of the clerk of the district court of Polk county. One M. D. Hoy obtained a judgment in the county court of Platte county against said Anderson and others, in the sum of \$605.08 and \$31.50 costs, and on the 17th day of September, 1889, said judgment was duly transcribed to the district court of Polk county. Each of the above mentioned judgments was rendered upon an ordinary debt, and not upon any claim whatsoever which would bind the homestead. Ander-

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son filed his petition in the district court setting up the foregoing facts. The defendants appeared and filed separate demurrers to the petition, which were overruled, and defendants failing and refusing to answer, the cause was heard upon the petition and evidence, and a decree rendered in favor of plaintiff. Defendant Hoy brings the case to this court for review on error.

The sole question in this case is whether the extent of a homestead in this state is to be determined from the fee-simple value of the land, or from the value of the homestead claimant's interest therein above the mortgages and other valid liens. The question presented is a new one in this court, and calls for a construction of the provisions of our homestead law.

Section 1, chapter 36, of the Compiled Statutes declares that "a homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Section 2 provides that if the claimant be married, the homestead may be selected from the property of the husband, or from the separate property of the wife, with her consent.

Section 3 reads as follows: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: First—On debts secured by mechanics', laborers', or vendors' liens upon the premises. Second—On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant."

It will be observed that the statute does not limit the right of homestead to any particular estate in land. It does not require that the claimant must be the owner of an estate in fee-simple in order to entitle him to the benefits of the homestead law. We are persuaded that any interest in land, coupled with the requisite occupancy by the debtor and his family, is sufficient to support a homestead exemption. In *Giles v. Miller*, 36 Neb., 346, it was ruled that the ownership of an undivided interest in land occupied as a homestead will sustain a claim of exemption from forced sale on execution or attachment as to such interest in the land. It has been held in Dakota, under a statute quite similar to ours, that homestead rights can be claimed in real estate held under a contract of purchase, although all the purchase money has not been paid. (*Myrick v. Bill*, 5 Dak., 167.) So in Michigan, a homestead can be acquired in land held under a partly paid school-land certificate. (*Allen v. Cadwell*, 55 Mich., 8.) If an interest in land less than the fee is sufficient to entitle a claimant to the benefits of the provisions of the homestead act, and there can be no doubt of it, it follows logically that the extent of a homestead is to be determined by the value of the claimant's interest in the land, whatever it may be. In case a valid mortgage upon the homestead remains unpaid, the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption of \$2,000 over and above the amount of the mortgage lien. That this is the proper construction to be given to the sections already quoted is made more clear when we consider the language of section 16 of the homestead law, which declares that "if the homestead be conveyed by the claimant, or sold for the satisfaction of any lien mentioned in section 3, the proceeds of the sale beyond the amount necessary to the satisfaction of such lien, and not exceeding the amount of the homestead exemption, shall be entitled, for the period of six months thereafter, to the same protection against legal

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process and the voluntary disposition of the claimant which the law gives to the homestead." Under this section, where a homestead is sold to satisfy a mechanic's or mortgage lien, the proceeds of the sale above the amount sufficient to discharge such lien, to the extent of \$2,000, are exempt from execution for the period of six months thereafter. It is reasonable to suppose that the legislature intended in enacting the statute that the extent of the homestead right should attach to the claimant's interest in the land over and above the amount of all valid mortgages or mechanics' liens thereon. This construction we have adopted is not without precedents elsewhere, and certainly is in line with the liberal rule of construction which always obtains in the interpretation of exemption laws. The following authorities have more or less bearing upon the question we have been considering: *Quinn's Appeal*, 86 Pa. St., 447; *Hill v. Johnston*, 29 Pa. St., 362; *Lozo v. Sutherland*, 38 Mich., 168; *Vermont Savings Bank v. Elliott*, 53 Mich., 256.

Applying the foregoing considerations to the case before us, it is clear that Anderson's interest in the land cannot be reached by an ordinary execution. The total value of the quarter section is but \$2,800, and deducting therefrom \$1,200, the amount of the mortgage, leaves Anderson's interest less than \$2,000. It follows that the transcribed judgments are not liens upon the real estate, and the court below did not err in so decreeing. To hold otherwise would be against the spirit, if not the very letter, of our homestead law.

It is said that the mortgage may in the future be paid off and released, or the land may increase in value, and it is argued from this that plaintiff below was not entitled to the relief prayed for. The decree only determined the rights of the parties at the time it was pronounced. In the event the land should rise sufficiently in value, or the mortgage thereon be canceled, the judgment creditors would

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School District No. 10 of Polk County v. Coleman.

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be entitled to enforce their judgments against the land, should it remain Anderson's property. The decree is

AFFIRMED.

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39	391
42	501
43	467

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SCHOOL DISTRICT NUMBER TEN OF POLK COUNTY ET  
AL. V. J. H. COLEMAN ET AL.

FILED FEBRUARY 20, 1894. No. 6023.

1. **Construction of Statutes.** A proviso should be construed as referring to what immediately precedes it only, unless a different intention is apparent from the act itself.
2. **Schools: DIVISION OF DISTRICTS BY COUNTY SUPERINTENDENT: NOTICE.** The proviso contained in the seventh paragraph of section 4, subdivision 1, of the general school law (ch. 79, Comp. Stats.) was intended to enlarge the powers of the county superintendent so as to authorize the creation of new districts in certain cases, containing less than six sections of land, and the changing the boundaries of existing districts without regard to the size of districts affected thereby, and is not authority for changing the boundary lines of districts in any case without the notice mentioned in paragraph number three of said section.

ERROR from the district court of Polk county. Tried below before BATES, J.

*Sedgwick & Power* and *E. E. Stanton*, for plaintiffs in error.

*E. L. King*, contra.

POST, J.

This was a proceeding before the county superintendent of schools for Polk county under the provisions of section 4, subdivision 1, of the general school law (ch. 79, Comp.

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Stats.). The proceedings before the superintendent are shown by his transcript as follows :

“OSCEOLA, January 12, 1892.

“A verbal notice being given me by Thomas Record, that a petition would be presented to me praying that sections 17 and 18, or parts thereof necessary to give school privileges to petitioners of school districts 10 and 56, Polk county, Nebraska, be detached from said districts and annexed to school district No. 34 of Polk county, Nebraska, the 18th day of January was set for hearing said petition.

W. F. KEPNER,

“*County Superintendent.*

“January 18, the day set for hearing said petition. The petition was presented, but not having all names desired on petition, I set January 19 as time for hearing said petition and prayer.

W. F. KEPNER,

“*County Superintendent.*

“January 19, the day set for hearing said petition, the following named persons, viz., Thomas Record, Joseph Rosine, N. P. Johnson, appeared with petition signed by Joseph Rosine, Anna Rosine, Milo Austin, Ellena Austin, Nels P. Johnson, Josephine (her x mark) Johnson. The substance and prayer of the petition was as follows:

“We, Nels P. Johnson and Josephine Johnson, Alma Johnson, Mabel Johnson, Emil Johnson, and William Johnson, and we, Ellena Austin and Milo Austin, parents of Clide Austin, Charles Austin, Vinnie Irene Austin, Alice Austin, Thomas Isaac Austin, and we, Joseph Rosine and Annie Rosine, parents of Irene Edith Rosine, and I, J. H. Coleman, parent of Chatta Coleman, would request that you attach to the adjoining district No. 34 sections 17 and 18 in districts 10 and 56, or so much thereof as you may deem necessary for the purpose of giving said children school privileges, for the following reason: A stream flowing through districts 56 and 10, known as the ‘Blue River,’

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makes it impracticable for their children to attend school in said districts, the school houses being on the north side of stream and they living on the south side of said stream.

"The undersigned persons, after being duly sworn before me, stated that the above statements are true and correct.

"THOMAS RECORD.

"JOSEPH ROSINE.

"N. P. JOHNSON.

"After due consideration of petition and prayer, I find in favor of petitioners, and that the cause is a just one, and hence the following decision :

"OSCEOLA, January 19, 1892.

"Joseph Rosine and Annie Rosine, Milo Austin, Ellena Austin, Nels P. Johnson and Josephine Johnson having certified before me this day that the Blue river makes it impracticable, during the wet season of the year, for their children to attend school in their own districts, Nos. 10 and 56 of Polk county, Nebraska, therefore, according to section 4, subdivision 1, of School Law, I have detached the following portion of land from district No. 56 of Polk county, Nebraska: E.  $\frac{1}{2}$  of sec. 17, and from district No. 10 of Polk county, Nebraska, W.  $\frac{1}{2}$  of sec. 17, E.  $\frac{1}{2}$  sec. 18, and and E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of sec. 18, all of which is in twp. 13, range 2 W., and joined the same to district No. 34 of Polk county, Nebraska.

"W. F. KEPNER,

"*County Superintendent.*

"January 30, 1892. Appeal bond filed and approved, and notice of appeal filed.

W. F. KEPNER,

"*County Superintendent.*"

From this order in favor of the petitioners an appeal was taken by district No. 10 and certain resident taxpayers therein. A trial was had in the district court and judgment entered substantially in accordance with the prayer of the petition, whereupon the cause was brought into this court for review by means of a petition in error.

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Numerous reasons are assigned by plaintiffs in error for a reversal of the judgment, the first of which is the overruling of their objection to the introduction of evidence by the petitioners on the ground that the proceedings before the superintendent were without jurisdiction and void. The cause was tried in the district court without pleadings, upon the original petition. But the foregoing objection appears to have been construed by all parties as presenting the question of the jurisdiction of the persons of the appellants and also the sufficiency of the petition. The contention of plaintiffs in error is that notice of the proposed change of the boundaries of the several districts affected is indispensable in all cases, while defendants in error argue that notice is not essential where the change is rendered necessary on account of streams of water which prevent children residing in any district from attending school therein. The particular provision relied upon to sustain this contention is the last sentence of the seventh paragraph of the section above cited, as follows: "When streams of water make it impracticable for children to attend schools in their own district, the county superintendent shall have authority, and it shall be his duty when requested by the parents of such children, to attach to adjoining districts such territory as he may deem necessary for the purpose of giving said children school privileges." Prior to the amendment of the school law in 1885 the first sentence of section 4 read as follows: "New districts may be formed from other organized districts under the following conditions only." In the year last named said section was amended by the addition thereto, immediately following the word "district" in the provision quoted, of the following: "and boundaries of existing districts may be changed."

It will be observed that the law as thus amended, and which is still in force, in express terms prohibits any change in the boundaries of school districts except upon

the conditions named therein. Immediately following the limitation referred to it is provided: First—That the superintendent may in his discretion create new districts upon petition of one-third of the legal voters in each district to be affected thereby. Second—That he may in his discretion change the boundaries of existing districts upon petition of one-half of the legal voters of the districts affected thereby. Third—That he shall not refuse to change the boundary lines of existing districts or to form new ones when petitioned to do so by two-thirds of the legal voters of each district affected thereby; also, that “a notice of said petition, containing an exact statement of what changes in district boundaries are proposed, and when the petition is to be presented to the county superintendent, shall be posted in three public places, one of which places shall be on the outer door of the school house, if there be one in each district affected, at least ten days prior to the time of presenting the petition to the county superintendent; *Provided*, That changes affecting cities shall be made upon the petition of the board of education of the district or districts affected.” Fourth—That districts may be divided or consolidated on certain conditions. Fifth—For a verified list of the legal voters in each district affected, also for proof of service of the notice provided for in paragraph number three. Sixth—That new districts shall not be formed between the first Tuesday of April and the first day of October. Seventh—That no new district shall contain less than four sections of land; “*Provided*, That when streams or water-courses make it impracticable to form districts containing four sections the superintendent may form districts with less than four sections without regard to valuation.” This proviso was added to the section by the amendment of 1883 and was the first authority for new districts of less than six sections. But the prohibition against the change of boundary lines so as to reduce existing districts to less

than that amount of territory (except in the cases provided for in the original act) continued in force until the amendment of the section in 1885 by the addition thereto of the provision under consideration. The original provision for districts of not less than six sections was evidently intended as a limitation upon the discretion conferred upon the superintendent by the other provisions of the act. According to an elementary rule of construction a proviso will be confined in its application to what immediately precedes it, unless a different intention is apparent from the act itself. (Sedgwick, Construction of Statutory and Constitutional Law, p. 226, note; 23 Am. & Eng. Encyc. of Law, 436, and note.) The effect of the amendments of 1883 and 1885 was therefore to enlarge the powers of the superintendent so as to authorize the creation of new districts of less than six sections and to change the boundaries of existing districts where children are prevented by streams from attending school, without regard to the size of districts affected thereby. The amendment of 1885, like that of 1883, was intended merely as a modification of the restrictive language of the original act with respect to the size of districts and not to confer upon the superintendent jurisdiction to change district boundaries at will, and, as in this instance, without notice of any kind.

The several provisions cited, when read together, are susceptible of but one construction, viz., that the notice mentioned in the third paragraph of the section is an essential condition to the exercise of the jurisdiction conferred upon the county superintendent to change the boundaries of school districts. This case is therefore within the rule stated in *State v. Compton*, 28 Neb., 491, and *Dooley v. Meese*, 31 Neb., 428. Quite applicable in this connection is the language of the court in the last named case: "In controversies in regard to the boundaries of school districts, where it is sought to change the same, it must appear that the preliminary steps were taken not only by the presenta-

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tion of the proper petitions, but by notice of the time and place of presenting the same. These notices should be placed in public places within each district to be affected, and if not so posted the proceedings will be invalid. The design of the notices is to give publicity to the proposed change so that all parties interested may appear in favor of or to oppose such change." It follows that in making the *ex parte* order changing the boundaries of the three districts named, the county superintendent exceeded his authority and that the objection should have been sustained. This conclusion renders an examination of the other questions presented unnecessary. The judgment of the district court is reversed and the action dismissed.

REVERSED.

GEORGE A. HOAGLAND ET AL., APPELLANTS, V. SOPHIA  
LOWE ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5181.

1. **Mortgages: MECHANICS' LIENS: PRIORITY: PRIVITY OF CONTRACT.** Where a party sells real estate and takes a mortgage for part of the purchase price, and postpones the lien of the mortgage to that of another mortgage given to obtain a loan, at the request of the purchaser, in consideration of his promise to use the money derived from the loan in making improvements on the premises, such promise being included and expressed in the purchase-money mortgage, *held*, that this did not constitute the mortgagor the agent of the mortgagee in making the contract for the erection of the building; that there was no privity of contract between the mortgagee and the laborers on, or furnishers of material for, the building; and that mortgagee was not a promoter of the building scheme, or operations; and that the mortgage lien would not be subordinated to the liens for labor done and material furnished,—the commencement of such labor and furnishing material being subsequent to the recording of the mortgage.

39	397
140	581
241	813
39	397
142	719
39	397
44	821

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**2. Mechanics' Liens: INTEREST TO WHICH LIEN ATTACHES.**

"A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must, at the time, take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest." (*Henry & Coatsworth Co. v. Fisher-dick*, 37 Neb., 207.)

**3. ———: MORTGAGES: PRIORITY.** Where a party receiving a mortgage for a part of the purchase price of real estate takes it subject to a mortgage given for a loan, the consideration for making the mortgage subject to the loan mortgage being the promise on the part of the mortgagor to use the loan so obtained for putting improvements on the premises, and the mortgagor pays the mortgagee a portion of the loan money on the purchase price as a cash payment, it being shown that the mortgagee had no knowledge that this was done, the mere fact of receiving such money will not entitle the mechanics' lien-holder, who commenced to perform work and furnish material for the buildings erected on the premises subsequent to the time of recording the purchase-money mortgage, in a suit for foreclosure of the mortgage and the liens, to a decree giving the liens priority over the mortgage, or to have the said mortgage lien postponed or made subordinate to the mechanics' liens in the amount of the sum so paid to the mortgagee.

**4. ———: ———: ———.** Where a party, purchaser of real estate, gives a mortgage to the vendor of such real estate to secure the balance of purchase price unpaid, and such mortgagee, in consideration of improvements being made and buildings erected on said real estate, allows said mortgage to become subsequent in priority to mortgages made to secure a loan for the purpose of erecting such improvements, said mortgage thereby made subsequent containing a clause whereby the mortgagor agrees to use all money procured by such loan mortgages in the erection of such buildings, and fails to do so, *held*, that the lien of the mortgage of said vendor should not be subordinated to the liens of the mechanics and material-men who commenced to perform labor and furnish material subsequent to the recording of said mortgage.

**5. ———: ———: ———.** A mortgage on real property in this state does not convey any title or vest any estate either before or after conditions broken, but merely creates a lien upon the mortgaged property; and the mortgagee's interest in the property mortgaged is not such an interest as constitutes him an owner within

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the meaning of the mechanics' lien law, and as a general rule his mortgage lien will not be subordinated to mechanics' liens predicated upon claims for labor and material, the performance and furnishing of which were commenced on a date subsequent to the record of the mortgage, pursuant to a contract with the mortgagor.

APPEAL from the district court of Douglas county.  
Heard below before DOANE, J.

*Switzler & McIntosh and A. C. Read, for appellants.*

*Chas. E. Clapp, J. B. Meikle, Mahoney, Minahan & Smyth, Smith & Powell, Cornish & Robertson, and Cavanagh & Thomas, contra.*

HARRISON, J.

In this case the plaintiff filed a petition in the district court of Douglas county, Nebraska, praying the foreclosure of a mortgage on "lot No. fourteen (14), block three (3) of Summit Place, an addition to the city of Omaha, as surveyed, platted, and recorded, said lot being sixty-eight (68) feet front on Farnam street and one hundred thirty-two (132) feet on Thirty-first street, together with all the appurtenances thereunto belonging, in the sum of \$4,761.27," alleging that the same was given for a portion of the purchase price of the premises mortgaged. The mortgage contained the following statement in regard to its being given to secure a part of the purchase money: "This mortgage being given to secure a portion of the purchase money of said premises." The mortgage also contained the following statement in reference to incumbrances, and the use of the money derived from the prior mortgages to pay for improvements, thereafter to be placed upon the lots: "That they are free from incumbrance except as follows, to-wit: One mortgage on the west half of said lot for \$4,000, payable five years after date and bearing interest at seven per cent per annum; one other mortgage of \$200 on said west

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half of said lot, payable one year from the 25th day of July, 1889; one mortgage on the east half of said lot for \$3,500, payable in five years from date and bearing interest at seven per cent per annum; and one other mortgage for \$175 on said east half of said lot, payable one year from the 25th day of July, 1889; all of said mortgages being from said Riley to Eugene C. Bates; said mortgages of \$4,000 and \$3,500 being given to procure a loan for the purpose of making improvements on said premises; and I further covenant, in consideration of this mortgage being made subject to said mortgages above described, that I will use the whole of the proceeds of said mortgages in the making of such improvements on said premises."

Of the defendants, E. Lillian Goodman filed an answer and cross-petition, asking the foreclosure of a mortgage on the "east half of lot fourteen (14), in block three (3), in Summit Place, an addition to Omaha, Nebraska, as surveyed, platted, and recorded, being a part of the southeast quarter of the northwest quarter of section twenty-one (21), in township fifteen (15), range thirteen (13) east, of the sixth principal meridian, with all the appurtenances thereto belonging," being a part of the same property covered by the Lowe mortgage. The Goodman mortgage was in the sum of \$3,500, and was one of the mortgages described in the Lowe mortgage and to which it was made subject. (See statement herein copied from Lowe mortgage, referring to this mortgage and its priority.) Eliza Marvin, guardian, filed a cross-petition, alleging ownership of the \$4,000 mortgage to which that of plaintiff was made subject, covering a portion of the property included in the Lowe mortgage, "the west half of lot fourteen (14), in block three (3), in Summit Place, an addition to Omaha, Nebraska, as surveyed, platted, and recorded, being a part of the southeast quarter of the northwest quarter of section twenty-one (21), in township fifteen (15), range thirteen (13) east, of the sixth principal meridian, with all the appurtenances thereto

belonging." The prayer of each of these cross-petitions was for foreclosure of the mortgage described in such petition. Chas. C. Bates also filed answers and cross-petitions asking for foreclosure of his mortgages on the same premises, they being given for his commission for making the loan evidenced by the Marvin and Goodman mortgages, one being for the sum of \$200, and one in the amount of \$175. Except Meyer & Raapke, all the other answering defendants filed answers in the nature of cross-petitions, alleging the performance of labor or furnishing of material, or both, in and for the erection of two houses on the premises in controversy, one house being placed on the portion of the lot described in the Goodman mortgage and one on the part covered by the Marvin mortgage.

The several answers of the mechanics' lien holders prayed for the foreclosure of the mechanics' liens, and that they might be declared prior to the mortgages of Goodman and Bates, Marvin and plaintiff. Meyer & Raapke filed an answer alleging the ownership of a judgment against the principal defendant, John Riley, and praying that the judgment be established as a lien against the premises in controversy, etc., but on the trial discovered that the defendant Riley in this case was not the one against whom they had judgment and offered no proof.

John Riley, the principal defendant, did not answer and was defaulted. A trial was had and proof offered of the various mortgages and mechanics' liens and evidence introduced bearing upon the question of the priority of the several liens of the mortgages and mechanics' liens, and a decree rendered ordering the sale of the property to satisfy the liens and establishing their priority, as follows:

"The court further finds that the order of priority of the several mortgages and liens as above described is as follows:

"First—That the mortgage of defendant E. Lillian Goodman is the first lien upon the east one-half of said lot,

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and the mortgage of David M. Marvin, testamentary guardian of Walter T. Marvin, a minor, is the first lien upon the west one-half of said lot.

"Second—The two mortgages of the defendant Charles C. Bates are the second lien on the said premises.

"Third—The mortgage of the plaintiff is the third lien upon said premises.

"Fourth—The mechanics' liens of the defendants Nell Seiroe, Balfe & Reed, George A. Hoagland, Freeman J. Ham, the Omaha Coal, Coke & Lime Company, and McBryan & Carter are fourth in the order of priority, and are equal to each other in the point of priority and shall share *pro rata*."

The case comes here on appeal by the several parties defendant who sought foreclosure of the mechanics' liens, their complaint being against that portion of the decree in which they are postponed in priority to the mortgages in suit, and more particularly that of Sophia Lowe. There is no claim made that the mortgages are not prior in point of time to the commencement of any labor or furnishing of material for the houses, either in the execution or recording.

The mortgages of Goodman, Marvin, and Bates were executed July 25, 1889, and recorded July 29, 1889. The mortgage to plaintiff was executed July 27, 1889, and recorded July 30, 1889, and no labor was performed on the houses or material furnished for them until the month of August 1889. Nor do the mechanics' lien holders claim that they did not know of the existence of the mortgages, or that they were not informed as to their recitals and contents, but the contention is made that, inasmuch as the plaintiff waived her right of priority and allowed her purchase-money mortgage to be postponed to the Marvin, Goodman, and Bates mortgages, under the statement in her mortgage that it was done in order that money might be obtained through the medium of the loans secured by the Good-

man and Marvin mortgages for the purpose of improving the property and building the houses, the mortgagor agreeing to use such money for that specific purpose and none other, and, furthermore, since Sophia Lowe was paid \$4,500 of the funds thus obtained as a part of the purchase price of the property, the liens of the mechanics and materialmen should be given priority to her mortgage and receive prior satisfaction from the proceeds of the sale of the premises. The further claim is made in regard to the Lowe mortgage, by the mechanics' lien holders, that it and the deed from Sophia Lowe to John Riley were executed in conformity with a verbal negotiation or contract of purchase and sale of the premises in controversy, and that the agreement of the purchaser to improve the premises was a constituent part of such contract of sale. That the Marvin, Goodman, and Bates mortgages should be held subsequent to the liens of the mechanics and parties furnishing material, for the reason that when the loans were made it was with the agreement that such funds were to be used for the improvement of the property and to build these houses, all parties to the loans entering into such agreement and having full knowledge of it. There is not much direct evidence respecting these points, and what there is does not, to any great extent, tend to sustain the allegations or positions of appellants, rather to contradict them; and it is only when we look to the face of the Lowe mortgage and what is therein stated in reference to improvements, coupled with the circumstances surrounding the whole transaction, that we can say that the evidence in the case tends to support their view of the situation and rights of the parties.

The following facts are established by the evidence: That the sale from Sophia Lowe to Riley was effected between Riley and one Fred Lowe, who acted for Sophia Lowe; that the agreement between them was that the mortgage which was to be taken by plaintiff (the one sought

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to be foreclosed in this case) should be subject to the Goodman, Marvin, and Bates mortgages, the consideration moving to plaintiff for so subordinating the lien of her mortgage being the promise of Riley to improve the property and to use for such improvement the money derived from the loans secured by said mortgages. This agreement on the part of Riley was embodied in the mortgage to plaintiff. (See copy hereinbefore set forth.) We are satisfied, from a careful examination of the evidence, that the contract for the improvement of the property on the part of Riley did not enter into the original agreement of sale between Riley and Fred Lowe, agent for Sophia Lowe, but was first talked of and agreed upon when the proposition was made by Riley to Fred Lowe that the mortgage to Sophia Lowe should be postponed, as a lien upon the premises, to the liens of the mortgages to Bates, now the Marvin, Goodman, and Bates mortgages. The evidence further discloses that Bates, in making the loan, relied upon the security of the property mortgaged, but understood, and was probably verbally promised by Riley, that improvements would be made upon the property; that Bates never knew any more about it and paid no further attention to it, relying upon the lot alone as security. The testimony further discloses that the money derived from these loans was paid to Riley, \$4,500 immediately upon the execution of the mortgages and the balance as he asked for it. That the loan of \$7,500 was divided and made upon different portions of the premises, for the reason that Bates, or the company for which he was agent, did not have money enough belonging to any one party to fill the whole loan. The evidence further shows that the \$4,500 paid by Bates to Riley July 29, 1889, was by Riley paid to Fred Lowe for Sophia Lowe as a part of the purchase price of the property without any knowledge on the part of Fred Lowe or Sophia Lowe, who it appears was never here and had no knowledge of the transaction except that gained by her mortgage, etc., that the \$4,500

was part of the funds coming from the loan of Bates to Riley and covered by the Marvin and Goodman mortgages. It also appears from the evidence that the plaintiff never in any manner, either herself or through her agent, directed, supervised, or knew anything of the payment of the loan money by Bates to Riley, the building contracts, or furnishing of material, or performance of labor, or any matter concerning the improvements. There is no evidence that the various persons furnishing material or performing labor, or any of them, ever examined the records before so doing, or knew of the agreement contained in the Lowe mortgage, or that they, or any of them, relied upon it in any degree or attempted to ascertain from what source the money to pay for the buildings was to be derived, other than from Riley, the apparent owner of the lot and the one with whom the contract for building was made. We have before stated that we were satisfied from the evidence that neither the plaintiff nor her agent, Fred Lowe, had any knowledge of where Riley obtained the \$4,500 with which he made the first payment of the purchase price of the lot. It must be further borne in mind that this payment was made July 29, 1889, several days prior to the time when any labor was performed on the buildings, or any material furnished, or any other rights had intervened or attached, at a time when Mrs. Lowe and Mr. Riley, being the only parties interested, could have changed the agreement to build to any extent, or wholly set it aside if so disposed, and no person has a right to complain. If it had been shown that the Lowes, or either of them, knew that the \$4,500 paid July 29, 1889, was a portion of the loan funds which by agreement was to be applied in payment for buildings or improvements, then the case would have appeared in a different light; but as it is, without any such knowledge on their part, we are satisfied that the mere facts that they received the money, and that it was received by Riley from the amount of the

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loans, are not sufficient to bind Mrs. Lowe to pay all or any of such amount on the liens for labor and material performed and furnished subsequent in their date of commencement to the filing and recording of the mortgage to her.

Section 1, article 1, chapter 54, Compiled Statutes, 1893, entitled "Mechanics' and Laborers' Liens," provides as follows: "Any person who shall perform any labor, or furnish any material or machinery or fixtures for the erection, reparation, or removal of any house, mill, manufactory, or building or appurtenance, by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, or building or appurtenance, and the lot of land upon which the same shall stand." It will be noticed that two of the necessary elements entering into a claim for a lien for the performance of labor or furnishing of material by virtue of this section are a contract, expressed or implied, and this with the owner of the property to be affected by the lien. It is not controverted in the case at bar that the parties declaring upon mechanics' liens had furnished material or performed labor in the improvement of the premises sought to be subjected to the liens in this case, and it is admitted that the contracts for such labor and furnishing of material were made with John Riley, the owner of the premises. There is some testimony to the effect that the property was bought by his brother, Bernard Riley, and for some purpose was decded to John. With this we have nothing to do here, and will hereafter refer to Riley, or John Riley, to whom the deed on its face was made, as the owner. The mortgagees in this case were not in any sense owners of the premises upon which the buildings were erected. They derived no title to the property by the mortgages and no other or further right than if any default was made in their conditions, to subject the property by legal procedure to the payment of

the debts secured thereby. In this state a mortgage of real estate merely creates a lien thereon as security for the debt, but conveys no title or vests no estate either before or after condition broken. (*Hurley v. Estes*, 6 Neb., 386; *Davidson v. Cox*, 11 Neb., 250; *McHugh v. Smiley*, 17 Neb., 626.) There is no contention made that the Goodman, Marvin, and Bates mortgages were given for any other consideration than the money loaned and a possible verbal understanding at the time of the loaning, between Riley, the owner of the property, and the loan agent, Bates, that Mr. Riley intended erecting buildings upon the lot at some time in the future. We have before stated that we are satisfied that the agreement of Riley to build did not enter into the contract of sale between Mrs. Lowe, or Fred Lowe, her agent, and Mr. Riley. The law of our state says that they took no title to the real estate by their mortgages, nothing but liens on the lot for the security of the debts, and we are left with the question, whether an agreement by the mortgagor of the premises with the mortgagee that he will improve or erect buildings, either verbally made or included in the mortgage as one of the conditions or covenants thereof, will subordinate or postpone the lien of the mortgage to a mechanic's lien for labor or material commenced to be performed or furnished after the mortgage is recorded.

In Phillips, *Mechanics' Liens* [2d ed.], sec. 225, p. 378, the general principle governing contests for priority between lien-holders and mortgagees is stated as follows: "The governing principle upon which the adjudications in contests for priority have been based is, that vested rights of purchasers or incumbrancers, and, reciprocally, the liens of mechanics, are not affected or displaced, when once attached, by other rights subsequently accruing. The priorities of each are jealously protected from hostile interference. The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest in

the land to be improved of the persons with whom they contract, and all negligence in this regard is charged to their own account." In section 232 it is further stated: "The rule of *caveat emplor* therefore applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making a contract, or for whose benefit he is about to employ his means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid or efficient lien."

In the case of *Hill v. Aldrich*, 50 N. W. Rep. [Minn.], 1020, a case in which the owner of a lot sold it on time with the understanding that the party purchasing was to build a house on the lot, the vendor to lend her \$1,000, it was held "that the vendor's mortgage was *bona fide* and prior to any lien on the premises for material furnished to the vendee for the construction of the building;" and in the body of the opinion, Mitchell, J., in passing upon the case, says: "There is no ground for imputing to the phrase '*bona fide*,' as used in this statute, any other than its usual and established meaning. Huntington certainly paid a full and valuable consideration for the mortgage. The arrangement between him and Mrs. Aldrich was one they had a right to make, and violated no rule of law or good morals. Mrs. Aldrich had a right to buy a lot on time and borrow money with which to improve it, and Huntington had an equal right to sell the lot on time and also lend the purchaser the money with which to improve it. That the building would enhance the value of the mortgage security, and that this fact was the inducement for Huntington's selling on time and lending part of the money with which to construct the building, certainly cannot affect the good faith of the transaction, as no one could have been misled or deceived by it. The deed and mortgage were

both on record, and had plaintiffs examined the records before furnishing the material, they would have disclosed the exact amount of incumbrance on the property. If they trusted Mrs. Aldrich without examining the records, it was their own negligence, for the consequences of which the law furnishes no relief. If they did examine, then they found Huntington's lien for \$3,000 on the property; and if they then made no inquiry of Huntington, they trusted Mrs. Aldrich with an apparent lien of \$3,000 ahead of them; and if they did inquire of him, then they learned that Mrs. Aldrich had \$1,000, and no more, in his hands to use building the house. In any view of the case they could not have been misled, and have no show of equity to demand that their lien shall be preferred."

In *Morony's Appeal*, cited in brief for appellee Sophia Lowe, 24 Pa. St., 372, the syllabus is as follows: "A mortgage given with a bond, and in common form and immediately recorded, and intended to secure the payment of a sum of money which the mortgagee then contracted to loan to the mortgagor for the purpose of enabling him to erect houses on the mortgaged property, and which was to be advanced in proportion to the progress of the work, is valid, though the contract of loan be not referred to in the mortgage, nor recorded; and it ranks as a lien for the amount loaned, from the date of its record and not from the date of the actual advances; and this is so though the mortgagor contracted to apply the money to the payment of the builders, and had, in part, failed to do so, and they had entered their liens;" and in the opinion it is stated: "If the owners of these liens trusted Montgomery without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it shall and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of Cadwalader standing good against Montgomery, and honesty forbids

them to cut it out for their profit. If they found it and still trusted Montgomery without inquiry, then they agreed to trust him even with a lien against him of \$12,000, and with no apparent means to pay them. If they made inquiries, then they learned that he would have \$12,000 in hands to pay for the improvements he was making and they trusted him that he would appropriate it properly. In no way that we can regard this case can we perceive that the appellants have any show of equity to demand that their claims shall be preferred to the mortgages."

Since the commencement of this action this court has decided the case of *Henry & Coatsworth Co. v. Fisher-dick*, 37 Neb., 207, in which decision it was held that where one furnishes money to build a house, for which he took a mortgage upon the premises whereon the erection was to be made, the record of such mortgage gave it priority to the rights of material-men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage; and this was a case where the agreement was with the mortgagee to build on the lots mortgaged, and the money, the proceeds of the loan, to be held by the mortgagee and paid out only upon the presentation to it of receipted bills for labor and material,—a much stronger case for and in favor of allowing the claims of liens prior to the mortgage lien than is the one at bar as between the Bates and Goodman, Marvin and Lowe mortgages, and the mechanics' liens. (See also *Platt v. Griffith*, 27 N. J. Eq., 207; *Choteau v. Thompson*, 2 O. St., 114; *Martsolf v. Barnwell*, 15 Kan., 612; *Wisconsin Planing Mill Co. v. Schuda*, 39 N. W. Rep. [Wis.], 558; *Crowell v. Gilmore*, 18 Cal., 370; *Mechanics Mill & Lumber Co. v. Denny Hotel Co.*, 32 Pac. Rep. [Wash.], 1073.) We believe the correct rule to be that the record of a *bona fide* mortgage entitles it to priority as a lien over the liens of mechanics and material-men, who, after the recording of the mortgage, commenced to labor upon or furnish material

for improvements made on the premises covered by the mortgage. Measuring the rights of the parties in this case by the above rule, the mortgages are placed in priority to the mechanics' liens, and in view of the conditions and relations existing between the parties, as shown by the testimony, this does not seem inequitable, nor do we think it is a departure from the just and wholesome rule which requires us to give to the provisions of the mechanics' lien law a liberal construction.

We do not believe there has been anything shown which could require that the liens of the Goodman, Marvin, and Bates mortgages should be postponed to those of the mechanics' lien holders; and as to Mrs. Lowe, Mr. Riley's contract with her, set forth in her mortgage and of record, plainly evidenced that she would have no control of the money to be obtained from the loans, or its appropriation; that she wholly relied upon him to fulfill his promise in regard to improvements and to use the loan funds in paying for them, and if he failed to do so, then she to be left with any remedy the law would afford her. The evidence does not show that any of the parties claiming liens for labor or material ever examined the records or made any investigation to ascertain the condition of the title, whether incumbered or not, or that there were any inquiries made; and the conclusion must be that they relied upon Riley as owner of the property and whatever lien they might be able to acquire and hold as against the premises; or if they in fact did examine the records (which the evidence does not disclose), they discovered that the plaintiff was relying solely upon the honesty and promise of Riley to apply the money loaned in the manner and to the purpose agreed upon, and in furnishing material and performing labor they placed reliance in the same condition of affairs and must be held bound by such action.

The counsel for appellants, the lien-holders, cite the case of *Bohn Mfg. Co v. Kountze*, 30 Neb., 719, and *Millsap v.*

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*Ball*, 30 Neb., 728, decided the same day, and strenuously contend that the doctrine then announced is applicable to and decisive of the case at bar. In the *Bohn Mfg. Co.* case, Kountze, the vendor, under a contract of sale, and holding the legal title, not only authorized but required the vendee to build a house upon the premises within a certain time and of a fixed value, and further agreed to advance money to pay for the building, but retained control of the funds, and no payments were made without his approval, and the money being placed in a bank, none was paid out unless he countersigned the checks. A careful and true examination and analysis of the case and of the cases therein cited will, we think, lead to the conclusion that it was held (quoting the language of the now Chief Justice NORVAL in the body of the opinion): "The correct rule doubtless is, where one holding land under a contract of purchase causes a building to be erected thereon, and the contract of sale contains no provision for the erection of a building, that the mechanic's lien is confined to the interest of the purchaser in the premises, and is subordinate to that of the vendor of the land for unpaid purchase money;" but, "where a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor." The opinion in *Millsap v. Ball* was also written by Judge NORVAL, and the main question raised was the same as in *Bohn Mfg. Co. v. Kountze*, and the decision in the last mentioned case was followed. We understand the rule announced in the above cases to be, that where a vendor of real estate, holding or owning the legal title, authorizes or requires the vendee to erect improvements upon the premises, the subject of the contract of sale between them, the lien of laborers or material-men, who perform labor or furnish material for the

improvements, will attach to the interest of both vendor and vendee and be prior to the lien of vendor for unpaid purchase money, and that the rule is general and applicable to any case coming within its terms. This is unquestionably the correct doctrine, just and right, but clearly can have no force in, and will not govern, the adjustment of the interests and claims of parties in the present case, where the agreement to build was not included in the original contract of sale and purchase, where the contract of sale and purchase has resulted in a deed from the vendor to the vendee and a mortgage back by vendee to secure payment of a part of the purchase money, whereby the vendor became a mortgagee, not the owner and holder of the legal title or of any title or estate, but possessed of a mere lien or security for the payment of the debt, no right or title in the premises upon which, under our statutes, a lien can be predicated. The case at bar is entirely without the rules established in the above cases.

We think the facts as developed in this case entitle the plaintiff's mortgage lien to the position which she agreed it should take, and that the appellants have selected, by their own choice, their place in the list of liens and must keep it. We conclude the decree of the lower court was right and answered the demands of justice and equity in the case and it is

AFFIRMED.

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AMERICAN BUILDING & LOAN ASSOCIATION v. DWIGHT MORDOCK.

FILED FEBRUARY 20, 1894. No. 5144.

1. **Rulings on Admission of Evidence:** REVIEW. The ruling of the trial court, sustaining objections to questions and answers in a deposition offered to be read at the trial, and ex-

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cluding the testimony from the jury, examined, and *held* correct, and no error in such action.

2. **Erroneous Admission of Evidence: INSTRUCTIONS.** Where erroneous evidence is admitted by a court, and in the instructions to the jury such evidence is withdrawn by the court from their consideration, *held*, that such withdrawal by the court cures the error committed in the admission of the evidence.
3. **Instructions.** The refusal of a trial court to give to the jury instructions asked by parties to the case, when instructions already given by the court on its own motion embody, though in different phraseology, the substance of instructions asked, *held*, no error in such refusal.
4. **Review.** Objections to instructions to a trial jury will not be noticed by the supreme court, unless the attention of the trial court is first called to them by the proper exceptions taken at the time the instructions were given. (*Warrick v. Rounds*, 17 Neb., 412.)
5. **Sufficiency of Evidence: REVIEW.** Questions of fact are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. (*Warrick v. Rounds*, 17 Neb., 412; *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 529.)

ERROR from the district court of Clay county. Tried below before MORRIS, J.

*J. L. Epperson and Charles H. Epperson*, for plaintiff in error.

*Thomas H. Matters*, contra.

HARRISON, J.

The defendant in error (plaintiff in the court below) commenced an action before a justice of the peace in Clay county, Nebraska, and recovered a judgment against plaintiff in error, who appealed the case to the district court, where the plaintiff below filed a petition alleging, first, the corporate character of defendant; second, that about the month of May or June, 1889, one James H. Brooks, agent

for the defendant company, agreed to make plaintiff a loan of \$350 on certain property in the town of Fairfield, Clay county, Nebraska, but stated that, in order to procure the loan, it was necessary for plaintiff to become a member of the defendant company; that plaintiff entered into the agreement for a loan and became a member of the company, receiving a certificate of stock for six shares of \$100 each; third, that by one of the conditions of the certificate of stock the plaintiff was allowed to return the certificate to the company at any time after one year from its date, and on so doing the company bound itself to repay to him all the several sums of money he had paid to it, with one-fourth the accrued profits upon the stock; that plaintiff was required to pay sixty cents per share on or before the 24th day of each and every month for the period of one year; that plaintiff made all of such payments as required by the contract; that defendant refused to make the loan, and also refused, upon the presentation for cancellation of the stock at the expiration of the year, to pay the amount of money paid it by the defendant, viz., \$52.20. The certificate of stock was attached to the petition as an exhibit and made a part of it. The plaintiff prayed judgment in the amount of \$52.20 and costs.

Defendant company, for its answer, denied each and every allegation of the petition except those expressly admitted; expressly denied the authority of James H. Brooks to promise plaintiff, for the company, a loan to plaintiff by the company, and pleaded that he was expressly forbidden to promise loans to any one, and that plaintiff knew of the limitation of the authority of Brooks as agent for the company. Defendant admitted that it was a corporation duly organized under the laws of the state of Minnesota; admitted that on June 24, 1889, it issued a certificate to plaintiff for six shares of its stock; admitted that payments of sixty cents per month per share were required to be made until the maturity of the stock or until with-

drawal ; admitted the application by plaintiff for a loan and that it was refused or rejected ; admitted the application by plaintiff for withdrawal and its refusal. Defendant further pleaded that plaintiff had made two applications for loans, one August 19, 1889, and one November 2, 1889, and in each application agreed to pay all the necessary expenses incident to the securing of the loans ; that defendant procured appraisals of the property offered as security for the loans to be made, at an actual and necessary expense in each instance of \$3.50, which sums the company states have never been paid by plaintiff, though often demanded of him ; that by the terms and conditions of the certificate of stock, any sums due from plaintiff were to be and were liens on the stock ; and further on this branch of the case pleaded chapter 34 of the General Statutes of Minnesota, alleging it to be as follows: "That it is provided by the General Statutes of the state of Minnesota, chapter 34, title 2, section 114, that building and loan associations 'shall at all times have a lien upon the stock or property of its members invested therein, for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided for selling delinquent stock.'" The defendant further stated that section 5 of article 2 of the by-laws provides as follows: "If any stockholder becomes indebted to the association in any way, such debt shall be a first lien upon the stock of such member, and such stock cannot be transferred or withdrawn until said debt is paid." That by reason of the indebtedness of plaintiff to the company, the company had a lien upon the stock of plaintiff, who was therefore not entitled to withdraw from the association ; that plaintiff had not paid dues on the six shares of said stock for the months of July to October, inclusive, in the sum of \$14.40, and that for such failure to pay dues, fines had been incurred by plaintiff in the sum of \$2.40. Defendant prayed for the dismissal of the plaintiff's action and for judgment against plaintiff for \$23.80 and costs.

Plaintiff replied, denying all new matter set up in the answer of defendant.

On the issues formed there was a trial to a jury, during which the court, by agreement of parties in open court, instructed the jury orally. The jury returned a verdict for plaintiff in the sum of \$40.87.

Motion for a new trial was filed, argued, submitted, and overruled. The court then made an order that the plaintiff, within ten days of the date of such order, bring into court and place on file the certificate of stock in controversy, for delivery to defendant and cancellation, plaintiff failing to so do, the verdict to be set aside and a new trial ordered. This order was of date May 28, 1891. On November 19, 1891, the following entry appears: "It satisfactorily appearing to the court that the defendant has deposited in this court for cancellation the shares of stock as by a former order of court he was required to do, and that said order has been fully complied with, it is considered and adjudged that the plaintiff, Dwight Mordock, have and recover of the defendant, the American Building & Loan Association, the sum of \$40.87 and his costs herein, taxed at \$47.93."

The first error of which the plaintiff in error complains is that the court erred in sustaining the objections to certain questions asked of witness B. F. Stoneman, and excluding the evidence from the jury. The questions and evidence referred to were contained in the deposition of witness Stoneman on pages 3 and 4 thereof. In order to understand the points raised by such assignment of error we will here give the questions and answers:

Q. On receiving applications for loans, what is the usual and customary practice of the association in getting information regarding the property offered by the applicant as security?

A. We apply for the appraisal from three disinterested parties.

Q. You may state whether or not it is customary to charge the appraisals so secured to applicants for loans.

A. It is.

Q. You may state whether or not it is customary practice of the association to permit the withdrawal of stock before all liens or charges against such stock are paid.

A. It is not.

Q. State whether under the rules, regulations, and by-laws of the association the expense of appraisals secured on plaintiff's property now are, and at the time of plaintiff's application for withdrawal were, a subsisting lien and charge against the plaintiff's stock.

A. Yes.

The first three of these questions called upon the witness to state what was customary with, or what was the usual customary practice of, the company in transacting the business of the loan department, and more particularly in regard to appraisals of the property offered as security, and the expense incurred in making such appraisals, and in the adjustment with members holding stock, of relations arising from the right of a member to the withdrawal of his stock when liens and charges existed in favor of the company against the stock. These were all governed directly, either by the terms of the contract entered into between the company and plaintiff at the time of the application for a loan, or the rules and by-laws of the association. The rights of the parties to this action could not be determined by "customary practice," but by their contract and the rules and by-laws of the association. We do not discover any prejudicial error in the ruling of the court sustaining the objection to these three questions.

The fourth and last question called upon the witness to give his conclusions of what was contained in the rules and by-laws of the company on the subject embraced in the question, and is open to the objection made for the reason that it was not the best evidence which could be produced.

The rules and by-laws should have been introduced, they being unquestionably the best evidence on the point as to which the witness was interrogated. The rule of evidence requires the best evidence of the facts to be proved, of which the case by its nature is susceptible, and especially does this apply where the question, as does the one in this case, indicates by its terms that there is better evidence than that sought to be elicited by the question as asked. We are satisfied the trial court was right in its ruling upon the objection to this question.

The court below sustained an objection to the offer of, by defendant as evidence, what is designated or known in the record as "printed literature," and this action on the part of the court is assigned as error. This "printed literature" is a pamphlet or circular, used mainly, I should judge, as an advertising medium of the association and contains certain of the rules and by-laws of the company and some general information regarding the objects of the company, its plan and business methods. If competent for any purpose under the issues being tried, it could only be, after proving that the plaintiff had seen it, to establish that he had notice of that portion of it which refers to the expenses of effecting a loan. This, in exactly the same words, is printed upon the back of the application for a loan which plaintiff signed, which was in evidence and not disputed in any particular. We cannot see where the defendant was harmed by the ruling of the court which excluded this "printed literature" from the jury.

Another alleged error of which complaint is made is that the court allowed the witness H. N. Jones, overruling the objection of defendant, to testify as follows: "Q. What is the usual and customary price for services of that kind? [Meaning the customary price for appraising property.] A. I never paid anything for having a piece of land appraised for obtaining a loan of money." This was probably objectionable; but if it was, the court cured any error

there was in admitting the testimony by afterward instructing the jury to disregard it. We here give the paragraph of the instruction of the court in which he calls attention to the evidence of Mr. Jones: "They were entitled, of course, to such reasonable charges as are usually made for like services, and I don't go out of my way to say that it is not what Mr. Jones would pay,—that is not the rule,—but what such services, if rendered, are reasonably worth in the community in which this loan is sought, and you must find that from the testimony." Such instruction effectually withdrew the evidence of Mr. Jones from the consideration of the jury and destroyed its effect; and the error, if any, admitting it was therefore avoided.

The further complaint is made that the court erred in giving certain portions of the instructions given by it on its own motion. No exceptions were taken to these instructions when given in the court below, according to the record, and objections to them will not now be considered here.

The defendant company assigns as error the refusal of the court below to give instructions numbered one, two, three, four, five, six, seven, eight, nine, and ten, as requested by it. We have made a careful and thorough examination of these instructions in connection with the instructions to the jury by the court on its own motion, and in any and all particulars in which the propositions embodied in the instructions refused were applicable to the issues and evidence in the case,—and in the main they were entirely applicable and pertinent,—they were substantially embodied in the instructions given to the jury by the court on its own motion, the only difference being in language, phraseology, and arrangement employed in delivering them. This brings this objection within the well known rule of this court "that it is not error in the court to refuse to give instructions when the same have in substance been already given." We conclude the court did not err in refusing to give the instructions.

The court below ordered the plaintiff to file with the clerk the certificate of stock within ten days, that the same might be canceled and delivered to defendant,—if the order not complied with, a new trial to be granted. This is complained of as error. We think it was clearly within the province of the court to make the order. It was undoubtedly a movement to assist in meting out justice and right between the parties, and we fail to see how it in any manner prejudiced the defendant company. If it was entitled to the surrender of the certificate, it was of as much effect and value at this time as earlier in the suit, or even prior to its commencement; and furthermore, the proof shows that when plaintiff requested to be allowed to withdraw, the certificate was deposited where the association could receive it at any time on payment of the amount due plaintiff on withdrawal, and that of this the company was informed at the time. The court had a right to make the order and its so doing was not error.

The only assignment of error which we have not noticed is that the verdict is not sustained by the evidence. We have read, examined, and carefully considered all the testimony produced on the trial of this case as contained in the bill of exceptions, and while we do not think that it was altogether satisfactory and convincing, and men might honestly differ in conclusions reached from hearing it and deliberating upon it, yet we do not feel warranted in saying that there was such a lack of evidence to sustain the verdict arrived at and returned by the jury that the verdict was clearly or manifestly wrong, and hence we will not disturb it.

The instructions given by the court below fairly submitted the issues between the parties to the jury, and there was sufficient evidence to sustain the verdict. The defendant had a fair trial and determination of its case. The judgment of the court below is

AFFIRMED.

**WILLIAM J. MCGILLIN V. CHASE COUNTY ET AL.****FILED FEBRUARY 20, 1894. No. 5526.**

**Taxes: INJUNCTION TO RESTRAIN COLLECTION.** The plaintiff filed a petition praying for an injunction to restrain a county and its officers from the forcible collection of a tax against personal property, averring, as grounds therefor, that the tax was illegal or unauthorized. The evidence discloses that he listed the property for taxation, the schedule on its face being a list of his individual property, signed by him and sworn to individually, and not as manager for a company, for whom he alleges in his bill for injunction that he listed the property, and to whom he stated it belonged, the taxes being charged to him in the tax lists as transcribed from the assessor's book. *Held*, That this was not such a state of facts as would entitle him to have the collection of the taxes enjoined or restrained as illegal or unauthorized, as such entry or charge on the tax list was the result or consequence of his own voluntary act.

ERROR from the district court of Chase county. Tried below before WELTY, J.

*Charles W. Meeker*, for plaintiff in error.

*S. E. Starry*, contra.

HARRISON, J.

November 25, 1890, the plaintiff filed a petition in the district court of Chase county, Nebraska, praying for an injunction. The petition was positively verified, and probably a better understanding of the grounds of the complaint and the relief sought will be obtained by here giving the pleadings in the case. The bill was as follows:

"Now comes the above named plaintiff, William J. McGillin, and respectfully represents and makes known to the honorable court, that he is a resident and taxpayer of Chase county, Nebraska, and that he is the owner and possessor

of real estate to the amount of 800 acres, and personal property consisting of horses, cattle, hogs, machinery, farming implements, harness, wagons, household goods, etc., of the value of \$10,000, all in said county and state aforesaid.

“Second—Your petitioner alleges and says that heretofore, to-wit, from on or about the first day of January, 1885, until on or about the 28th day of October, A. D. 1888, he was the duly chosen, selected, and acting manager of the Harlem Cattle Company, a corporation duly incorporated under and by virtue of the laws of the state of Colorado, and doing business in the counties of Chase, Dundy, and Hitchcock, and state of Nebraska; that it was the business of said Harlem Cattle Company to purchase, buy, raise, and breed, and sell horses, cattle, and hogs, both common and thoroughbred, and that while so engaged in said business of stock raising, buying, and selling, said company had upon its Chase county ranches, at all times, several hundred head of horses and cattle, and also several thousand dollars' worth of other personal property, consisting of farm machinery, wagons, harness, and household furniture, and did have and own upon its Harlem ranch in Chase county, Nebraska, almost all the buildings and other improvements it owned in said county, and that said Harlem ranch was petitioner's headquarters as manager of and for said Harlem Cattle Company for said Chase county.

“Third—Your petitioner represents that during the year 1888 the said Harlem Cattle Company had and kept the major or greater portion of their said stock of horses and cattle in Chase county, upon their Harlem ranch, which is located in what was then known and called ‘McGillin Precinct,’ in said county, there being kept thereon about 350 head of cattle, and about 150 head of horses, and about 10 to 25 head of hogs; also, there was kept at said Harlem ranch the greater portion of their farm machinery, household and kitchen furniture, wagons, and feed; and that

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the total value of all of said personal property, so as aforesaid kept upon said Harlem ranch, during said year of 1888 was between \$10,000 and \$15,000; that all of said property so as aforesaid was the property of and belonged to the Harlem Cattle Company, and was under their exclusive charge, control, and directions, and that your petitioner had no authority or interest in them or over it save only as was delegated to him by said Harlem Cattle Company as its manager.

“Fourth—Your petitioner further represents that all of said property of the said Harlem Cattle Company in the counties of Chase, Hitchcock, and Dundy was mortgaged to the Kit Carter Cattle Company of Texas for about \$92,000, and said mortgage was duly of record in the clerk's office in said counties.

“Fifth—Your petitioner further represents that for the year 1888 the county officers and local assessors and taxing officers of Chase county procured an assessment to be made by the precinct assessors in said county upon the real and personal property of said Harlem Cattle Company and levied a tax thereon and spread the same upon the records in the tax books of said county, and that the county officers and local assessors and taxing officers for the precinct then known, designated, and called ‘McGillin Precinct,’ in said Chase county, one of the precincts in which a large portion of the lands, buildings, and personal property of the said Harlem Cattle Company was then kept and located, said assessor being H. B. Walker, of said McGillin precinct, listed, scheduled, and assessed the said real and personal property of the said Harlem Cattle Company in the said McGillin precinct from the data, information, and facts furnished to said H. B. Walker by your petitioner, then the manager of said Harlem Cattle Company, 350 head of cattle, valued at \$5,000; horses, 150 head, valued at the sum of \$6,000; hogs, 10, valued at \$10; agricultural implements, household goods, etc., valued

\$140; carriages and wagons, 3, valued at \$30; making a total valuation of \$11,185. That after said assessor had finished taking down, listing, and scheduling property, he passed said list or schedule to your petitioner to sign for said Harlem Cattle Company, and your petitioner did then and there, in the presence of said H. B. Walker, assessor for said McGillin precinct, sign the same, 'W. J. McGillin, Manager,' and did there acknowledge the said schedule to be true, as I believed, said schedule being marked at the top, 'Property of Harlem Cattle Company.'

"Sixth—That said county officers and local taxing officers and assessor of said county proceeded to and levied a tax thereon and spread the same upon the tax books and records of said county as a tax against the petitioner in and for said precinct of McGillin, instead of against the Harlem Cattle Company, the rightful owners of said property, and said tax for said year of 1888 for said precinct of McGillin was spread, and does now stand against this petitioner, on the tax books and records of said Chase county, and the same was wrongful, illegal, unlawful, and unjust.

"Seventh—The total valuation placed upon said personal property of said Harlem Cattle Company in said precinct of McGillin by said assessor for said year of 1888, and wrongfully, illegally, and unjustly spread upon the tax books and records against this petitioner, was the sum of \$11,185, and the total amount of tax levied thereon for said year 1888 by the county officers and local taxing officers of said county was and is the sum of \$303.39, which was and is spread upon the tax books of said county as a tax lien and against the property of this petitioner.

"Eighth—Your petitioner further alleges that at and during the year 1888 he was not the owner of, in his own name or right, any personal property in said Chase county which was subject to assessment and tax whatever, except his bedroom set and wearing apparel, the total value

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of which would not exceed \$15, and that he was not the owner of any of the personal property assessed to the Harlem Cattle Company in said precinct of McGillin, and erroneously, illegally, unlawfully, and unjustly spread upon the tax records of said county in this petitioner's name for said year of 1888, but that all of petitioner's personal property then owned by him was assessed and taxed in Hitchcock county, the county in which his personal property was then kept.

"Ninth—Your petitioner further alleges and says that on or about the 28th day of October, 1888, and while petitioner was yet the manager of said Harlem Cattle Company, the Kit Carter Cattle Company commenced an action in foreclosure of its mortgage against the said Harlem Cattle Company in the United States circuit court for the district of Nebraska, and at the same time made their application to said United States circuit court for the appointment of a receiver for all the property of said Harlem Cattle Company, which application was by the said court duly allowed and granted, and Erastus D. Webster was by said court duly appointed and empowered receiver, and the said Erastus D. Webster, as receiver, did immediately take full possession of all of the said Harlem Cattle Company's property and effects in the state of Nebraska; that said receiver held said property and effects until the 19th day of August, 1889, when the whole of the personal property of said Harlem Cattle Company was, by the order of the United States court, sold, and your petitioner, being the purchaser thereof, paid into the said United States court therefor the sum of \$36,200, and by order of said circuit court the said entire personal property and effects of the said Harlem Cattle Company was, by said Erastus D. Webster, receiver, delivered over to the possession of your petitioner, and he became the sole and absolute owner of the same.

"Tenth—Your petitioner alleges further that said tax

of \$303.39, for the year of 1888, so as aforesaid spread upon the reports and tax books of said county, upon the \$11,185 valuation in said McGillin precinct of said Chase county, against this petitioner by the assessor and local taxing officer of said Chase county, is wrongful and unjust, and for an illegal and unauthorized purpose.

“Eleventh—Your petitioner further alleges that said Chase county, through its officers and assessors, had no authority of law for the assessment of said property, and the levying of said taxes in said precinct of McGillin, in said Chase county, to this petitioner; that said property was not assessable or taxable to him under the law, and could only be valued, assessed, and levied for taxation to the legal and proper owner thereof, the Harlem Cattle Company, and the pretended assessment, levy, and taxation of the same to this petitioner by the local taxing authorities of said Chase county is null and void, and of no effect in law as to this petitioner other than to create an apparent lien and cloud upon petitioner’s property.

“Twelfth—Further, this petitioner represents to the court that said tax, so levied by the said taxing officer and authorities of Chase county for the precinct of McGillin upon the said property of said Harlem Cattle Company for the year 1888, and spread upon the tax books and records of said county as a tax lien against the said property of your petitioner, does now appear thereon as an apparent lien upon his property in said county, and that said county, through its officers, and through the said Robert A. Ewing, as treasurer of said county, have threatened to proceed to the collection of said tax, as aforesaid wrongfully and illegally assessed and recorded against this petitioner, by process of law, and that unless they are restrained by said court, the county, through its officers, will proceed to collect the said tax so illegally levied and recorded by said county on the property of petitioner by advertisement and sale of petitioner’s personal property; that this petitioner

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has no remedy at law to prevent said county and Robert A. Ewing, treasurer, and its officers from collecting the said tax by distress and sale, and that he will suffer great and irreparable damage if they are allowed to proceed in the collection of the same.

"Therefore, your petitioner prays that a writ of injunction may be issued restraining the said county and the said Robert A. Ewing, as treasurer of said county, and all other officers and agents of said county, from in any manner interfering with or intermeddling with the property of this petitioner, and restrain them, and each of them, from the collection of said tax, or any part thereof, and from taking any steps under the law for that purpose, and for the return of all property already taken and held by them, and that on the final hearing of said cause the said tax may be decreed null and void and of no lien or effect on the property of or against this petitioner, and that said temporary injunction may be made perpetual, together with such other and further equity as justice may require."

This was presented to the county judge with the showing of absence from the county of the district judge, and the county judge allowed a temporary injunction. March 26, 1891, the defendants filed answer as follows:

"Now come the above named defendants, and in answer to plaintiff's petition, deny each and every allegation therein, except those especially hereinafter admitted.

"Admit that plaintiff herein is a resident and taxpayer in Chase county, Nebraska, as alleged and set forth in first count of said petition.

"Wherefore defendants pray that said temporary injunction be dissolved, with such other and further relief as equity and justice may require."

May 3, 1892, there was a trial had of the issues, and the following is the journal entry of the proceedings in this case, to-wit:

"On this third day of May, 1892, this being one of the

days of the regular May, A. D. 1892, term of the district court begun and holden in Chase county, Nebraska, and this cause coming on to be heard before the court upon the motion of the defendants to vacate and set aside the injunction heretofore granted in the case, was submitted to the court upon the petition, answer, and evidence of the parties, on consideration whereof it is ordered that said motion be sustained, and the court finds, upon the issues joined, in favor of the defendants.

“It is therefore considered, adjudged, and decreed by the court that the injunction heretofore granted in this cause be, and the same hereby is, vacated and set aside, and that the defendants recover from the plaintiff their costs herein expended, taxed at \$150.”

There was a motion for a new trial, which was overruled and the case brought here for review.

At the time of the assessment and levy of the tax complained of in the foregoing petition the assessor was required to visit every person owning or holding any property in the precinct for which he was assessor and list the name of the party and demand from him a correct list of the taxable property owned by him, and the party so requested to schedule his property was by the law required to give a full, true, and correct statement of his taxable property, such list to be signed and sworn to by him. This list or schedule was preserved, indorsed with the name of the person assessed and with all others received by such assessor, the whole number being arranged in alphabetical order, delivered to the county clerk and by him kept in his office. The assessor was also to enter the various lists of property in a book, giving the names of the parties in alphabetical order, and to return such book, verified by his affidavit as to correctness, etc., to the county clerk to be filed and kept in his office. Our law further provided for the equalization of taxes by the proper board, and after equalization, the transcribing, by the county clerk, of the

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assessments of the several precincts, etc., into a suitable book, and from the list of names and charges entered in such book the collection of taxes was to be made. The above is a general statement of the effect of the several sections of the Compiled Statutes of Nebraska, 1887, chapter 77, under the head of "Revenue," of which we will not make specific citation by section, as the foregoing general statement will be sufficient for our purposes here. We desire to call attention more particularly to the facts that the list or schedule, required of the taxpayer and to be signed and sworn to by him, is the initial or starting point of the assessment, is copied into the assessor's book, indorsed with the name of the person assessed, and after the assessor has verified this book as a correct list of names of persons from whom schedules have been received or taken, together with such book, is delivered to the county clerk and filed in his office and there kept; that the tax list prepared by the county clerk and turned over to the treasurer is a transcript of the assessor's book and the book a copy of the schedules. From this we gather that unless, for some reason, a change has been made or an error occurred, the property will be charged in the tax list against the one whose name is signed to and who has verified the schedule. On this point there was evidence introduced on the trial below tending to show that the schedule in this case was headed "The Harlem Cattle Company," and was signed "Harlem Cattle Company, by W. J. McGillin, Manager," or "W. J. McGillin, for the Harlem Cattle Company." On the other hand, there was testimony that the schedule was one purporting to list, or by its terms listing, the individual property of W. J. McGillin, and signed and sworn to by him in his individual capacity, and not as manager for the company as before stated. The original schedules were not produced at the trial. One witness states: "We had a fire soon after that, burning the buildings down containing the records, and the original schedule is sup-

posed to have been burnt in that fire. It was only a few days before that, I think, that we got that copy." After a full and careful consideration of all the evidence in the case, we conclude that it establishes the facts that the schedule was, on its face, a list of the individual property of W. J. McGillin, and as such was signed and verified by him personally and without referring in any manner to his being manager of the Harlem Cattle Company; that the assessment book was copied from the schedule and the tax lists transcribed from the assessor's book or the schedule, or possibly by referring to both, and was thus constituted from the information furnished by the party who would now be heard to complain. Hence, the officer who prepared the tax list was warranted in entering the tax against McGillin; indeed, he could not do otherwise. We conclude that the appellant stands in no position to ask the court to set aside or enjoin that which springs from his own voluntary act. He made the statement upon which the officers proceeded, was taxed accordingly, and the fault, if any, was his. (*Winfield Bank v. Nipp*, 28 Pac. Rep. [Kan.], 1015; *Hubbard v. Winsor*, 15 Mich., 146.)

The appellant failed to make out such a case as calls upon a court to enjoin the collection of the taxes in question on the ground of their being illegal or unauthorized. To hold otherwise would make the tax field a much larger one than it now is for the exercise of the industry of the courts and counsel, and would introduce into the collection of the public revenues an element of uncertainty and allow the proceedings and lists, through which they are evidenced and collected, to be questioned in a manner which would not nearly be compensated by the justice and equity possibly thereby effected in some individual or particular instances or cases.

There were some other questions raised and discussed in the briefs of counsel, but as the foregoing decision of one question will dispose of the case, we do not think it

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necessary to take up any of the other matters. The findings and judgment of the lower court were right and are

**AFFIRMED.**

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**FIRST CHRISTIAN CHURCH OF BEATRICE, NEBRASKA,  
APPELLANT, V. CITY OF BEATRICE, APPELLEE.**

FILED FEBRUARY 20, 1894. No. 6602.

**Taxation: PROPERTY OF RELIGIOUS SOCIETIES: EXEMPTION.**

The exemption by section 2, article 1, chapter 77, Compiled Statutes, of "property which may be used exclusively for religious purposes" does not extend to property owned by a religious society separate and distinct from that on which is situated its church edifice, the mere intention in the future to erect such an edifice on said property not so occupied, and the accumulation of the present rents arising therefrom for that purpose, not being sufficient to bring the property within the purview of the statute referred to.

**APPEAL** from the district court of Gage county. Heard below before BUSH, J.

*J. E. Cobbey*, for appellant, cited: *Omaha Medical College v. Rush*, 22 Neb., 449; *Von Steen v. City of Beatrice*, 36 Neb., 421; *House of Refuge v. Smith*, 21 Atl. Rep. [Pa.], 353; *State v. Fisk University*, 87 Tenn., 233; *Northwestern University v. People*, 99 U. S., 309; *State v. Collector of Chatham*, 52 N. J. Law, 373; *State v. Silverthorn*, 52 N. J. Law, 73; *Tulane Education Fund v. Board of Assessors*, 38 La. Ann., 292; *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann., 68; *City of Philadelphia v. Pennsylvania Hospital for the Insane*, 154 Pa. St., 9; *State v. Powers*, 10 Mo. App., 263; *North St. Louis Gymnastic Society v. Hudson*, 85 Mo., 32; *Mt. Hermon Boys' School v. Town of Gill*, 13 N. E. Rep. [Mass.], 354; *Willard v. Pike*, 59

Vt., 202; *Trustees of Wesleyan Academy v. Inhabitants of Wilbraham*, 99 Mass., 599; *Young Men's Christian Association v. City of New York*, 44 Hun [N. Y.], 102; *Hebrew Free School Association v. Mayor of City of New York*, 4 Hun [N. Y.], 446; *Shaarai Berocho v. Mayor of City of New York*, 18 N. Y. Supp., 792; *Vestry of St. Philip's Church v. City Council of Charleston*, McMul. Eq. [S. Car.], 144.

*E. O. Kretsinger, contra*, cited: *Gibbons v. District of Columbia*, 116 U. S., 404; *Morris v. Lone Star Chapter No. 6, Royal Arch Masons*, 5 S. W. Rep. [Tex.], 519; *Third Congregational Society v. City of Springfield*, 18 N. E. Rep. [Mass.], 68; *Congregation Kal Israel Auschi Poland v. City of New York*, 1 N. Y. Supp., 35; *Massenburg v. Grand Lodge F. & A. M. of Georgia*, 7 S. E. Rep. [Ga.], 636; *People v. Collison*, 6 N. Y. Supp., 711; *People v. O'Brien*, 6 N. Y. Supp., 862; *Young Men's Christian Association v. Mayor of City of New York*, 21 N. E. Rep. [N. Y.], 86; *Ramsey County v. Church of the Good Shepherd*, 47 N. W. Rep. [Minn.], 783; *People v. Ryan*, 27 N. E. Rep. [Ill.], 1095; *Ottawa University v. Board of County Com'rs of Franklin County*, 29 Pac. Rep. [Kan.], 599; *City of Kansas v. Kansas City Medical College*, 20 S. W. Rep. [Mo.], 35; *St. Edward's College v. Morris*, 17 S. W. Rep. [Tex.], 512; *Mulroy v. Churchman*, 52 Ia., 238; *Mulroy v. Churchman*, 60 Ia., 717; *Kendrick v. Farquhar*, 8 O., 189; *Trustees of Methodist Episcopal Church v. Ellis*, 38 Ind., 3; *Fort Des Moines Lodge No. 25, I. O. O. F., v. Polk County*, 56 Ia., 34; *Green Bay & M. Canal Co. v. Outagamie County*, 45 N. W. Rep. [Wis.], 536; *Brodie v. Fitzgerald*, 22 S. W. Rep. [Ark.], 29; *City of New Orleans v. St. Patrick's Hall Ass'n*, 23 La., 512; *Northwestern University v. People*, 80 Ill., 333; *First M. E. Church v. City of Chicago*, 26 Ill., 482; *Pierce v. Inhabitants of Cambridge*, 2 Cush. [Mass.], 612; *Boston Society of Redemptorist*

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*Fathers v. City of Boston*, 129 Mass., 178; *Washburn College v. Commissioners of Shawnee County*, 8 Kan., 344; *Wyman v. City of St. Louis*, 17 Mo., 336; *Trustees of the Methodist Episcopal Church v. Ellis*, 38 Ind., 3; *State v. Ross*, 4 Zab. [N. J. L.], 497; *County Commissioners of Frederick County v. Sisters of Charity of St. Joseph*, 48 Md., 43; *Ramsey County v. Macalester College*, 53 N. W. Rep. [Minn.], 704.

RYAN, C.

The appellant in this case appeared before the city council of the appellee, sitting as a board of equalization, and asked that certain real property assessed as the property of appellant be stricken from the assessment roll. This request was denied, and therefrom an unsuccessful appeal was taken to the district court of Gage county, from which the church appeals to this court. The case was submitted and determined in said district court upon the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties hereto that the plaintiff and defendant are incorporated as alleged in petition; that the plaintiff, the First Christian Church, owned in Beatrice at the corner of Sixth and Ella streets the land upon which stood their house of worship, and that the said plat of ground was used exclusively for church purposes, and was not assessed or valued for taxation; that said property was sold to the United States government, and the proceeds thereof, after the payment of the incumbrance thereon and the debts of said church, were invested in the property in question in this suit, lots four, five, and six, in Freeman's subdivision, upon which were and still are standing two dwelling houses and a small barn; that no other money went into the purchase price of said property; that the official board of plaintiff, by resolution, about the time of the purchase and more than a year prior to this date, decided that all funds arising from the rentals of said property be, and the same were, set apart,

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and since have been kept in a separate fund for the purpose of erecting and building on said lots a house of worship or church building; that while said fund is accumulating, said church society are temporarily holding religious and other services in another place, and not on the lots in question, there being no suitable room or building on said lots, so assessed, in which to hold their meetings; that said property was placed on the assessment roll, and that the board of equalization of said defendant refused to strike the same therefrom on plaintiff's motion.

"It is further stipulated that the said church society now hold in fee at the corner of Seventh and Ella streets, in the city of Beatrice, a piece of real estate 100 feet wide and 140 feet deep, on which is situated a parsonage for the home of the minister of said society; and a large church house also stands upon said real estate, which is now, and has for more than two years last past been, used for all purposes by said society as a place of worship, and where religious services of all kinds have been held by said society; that the lots so taxed and in dispute are entirely disconnected from the lots or real estate on which the parsonage and church house of the said society are now situated, and 460 feet therefrom in another block in said city; and that the church property now used by said society is worth not less than \$5,000, and the lots so taxed are worth not less than \$2,500; and that the lots taxed have never been used for religious purposes, and at no time have religious services been held there.

"J. E. COBBEY,

"*Attorney for Plaintiff.*

"E. O. KRETSINGER,

"*Attorney for the City of Beatrice.*"

The right of exemption from taxation is claimed by the appellant under the provisions of section 2, article 9, constitution of Nebraska, supplemented by section 2, article 1, chapter 77, Compiled Statutes. That part of the section of

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the constitution referred to which has application to this case is as follows: "The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for \* \* \* religious \* \* \* purposes may be exempted from taxation, but such exemptions shall be only by general law." Section 2, article 1, chapter 77, Compiled Statutes, provides that such property as may be used exclusively for religious and other specified purposes shall be exempt from taxation. This exemption extends to property, personal as well as real, though that under consideration falls within the latter class. The stipulation shows that the appellant owns real property upon which is situate its church edifice, which property and edifice is of the value of \$5,000. Separate and quite a distance from this property it owns other lots, including buildings, which it rents, of the aggregate value of \$2,500. It is insisted that the fact that this religious society has duly resolved that it will erect a church building upon the real property last above referred to at some indefinite time in the future, and that meantime the rents arising from leasing said last named property in its present condition to that purpose, makes the said property such as is used exclusively for religious purposes. It might be that these rents would be exempt under the provisions of the constitution and the statute to which allusion has been made, for it might be contended with much plausibility that the money derived from rents is property to be used exclusively for religious purposes. After the rent has been collected it is as property very distinct from the realty out of which it arose, and evidence of an intention to devote rents to a religious purpose has not even a tendency to show the nature of the use of the real property from which the rents have been derived. Let us suppose, merely by way of illustration, that one of the lessees of this real property should erect a building thereon for use as a saloon. Would it be contended that

the property was, after the saloon was in operation, used exclusively for religious purposes merely because of appellant's intention to make such use of the rents issuing from the thus improved property? This question would meet with a prompt and unequivocal negative, and such negative would be a complete answer to the contention made on behalf of the appellant. Authorities have been freely cited by both appellant and appellee, but as the cases decided depend very much upon distinct statutory provisions, we have thought best to confine attention to our own constitution and statute on the subject under discussion. The judgment of the district court is

**AFFIRMED.**

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43	71

**BANK OF COMMERCE V. PETER GOOS.**

FILED FEBRUARY 20, 1894. No. 5150.

1. **The damages recoverable for the refusal of a bank to pay a check, drawn upon it by one who has funds with the bank wherewith to make such payment, should not exceed such amount as reasonably and fairly in the natural course of things would result from such refusal.**
2. **Damages.** General damages are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law.
3. **Introduction of Improper Evidence: EFFECT: REVIEW.** When a party litigant has, by an evasion of the adverse ruling of the court, intentionally and willfully introduced evidence of facts improper for consideration by the jury, it must be presumed that such improper evidence has had a prejudicial effect, and the verdict should accordingly be set aside.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

*Cornish & Robertson*, for plaintiff in error.

*C. A. Baldwin*, contra.

RYAN, C.

By his petition filed in the district court of Douglas county, Nebraska, Peter Goos alleged that the Bank of Commerce was a corporation carrying on a general banking business, and that as such it invited and received deposits to be held and paid out upon the checks of its customers; that during the month of September, 1889, the said Goos was a depositor in said bank, and had on deposit in said bank about \$3,300 on the 20th of said last-named month. The injuries for which compensation was sought were described in the following language: "Plaintiff says that on the 20th day of September, 1889, and when he so had in said bank said balance of more than \$3,300, that said bank had so received from plaintiff, as aforesaid, on deposit, and which said sum of money was so held by defendant subject to the order of plaintiff, he drew his check on said bank for the sum of \$804.90, payable to the order of the city treasurer of Omaha; that at said date John Rush was the city treasurer of Omaha, and plaintiff delivered said check to said Rush in payment of certain taxes due from the plaintiff to the city of Omaha; that afterwards, on the 23d day of September, the said check was presented to said defendant [Bank of Commerce] for payment, and payment was refused on said check on the pretended excuse that plaintiff had no funds in the bank, and the defendant made no other or different excuse for not honoring and paying said check, and said check was not paid by defendant and never was, and was returned by said bank to said Rush dishonored and

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unpaid. Plaintiff says that at the time said check was presented for payment at defendant's bank, and at all times from and after September 20, 1889, plaintiff had on deposit in said bank, subject to his order and to be paid on his checks, more than \$3,000, and out of which said funds said check should have been paid. Plaintiff says that for the reason that said check was not paid by said defendant when it was so as aforesaid presented to said bank for payment, and for no other cause, and without any fault on the part of said plaintiff whatever, the said John Rush filed a complaint with the police court of Omaha charging said plaintiff therein with the crime of obtaining a tax receipt under false pretenses and by falsely and feloniously representing to said Rush that he had funds in said defendant's bank subject to be paid on the check of said plaintiff; and upon said complaint having been so filed a warrant was issued by the police judge of Omaha for the arrest of said plaintiff, and by authority of said warrant and upon said complaint said plaintiff was arrested by the police officers of Omaha and was taken to the city prison, where said plaintiff was imprisoned with the lowest, filthiest, and most abandoned of human creatures, and plaintiff was kept so imprisoned for a long space of time, to-wit, four hours, and was released from his said imprisonment on the condition only of giving bail in the sum of \$1,200 for his appearance at the time fixed by said court for the trial of his case, and plaintiff was compelled to and did give said bail and was thereby released from his said imprisonment. Plaintiff says that when he so gave said check he had, and knew he had, in said bank, subject to his order, a sum of money greatly in excess of the amount of said check, and plaintiff had no notice or suspicion even that said check would not be honored and paid, and said check was so given by said plaintiff in good faith expecting that it would be honored and paid, and said check would have been paid but for the false, wicked, and cruel and illegal act of said defendant, its offi-

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cers and employes, in refusing to honor and pay the same. Plaintiff says that he was, and for several years last past has been, engaged in the business of keeping a hotel in Omaha, and by so doing formed an extensive acquaintance in the state of Nebraska and adjoining states among the traveling public; that plaintiff is also doing an extensive business in various branches of trade, oftentimes requiring an extensive credit to carry on his said business, which before the occurrence of the events so complained of he was able to and did obtain. Plaintiff says that by reason of the refusal of the said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was known or could be determined, the said charge against him and the fact of his arrest and imprisonment was published in the daily papers of Omaha and sent broadcast over the land in this state and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely; and plaintiff's character was by reason of the premises aforesaid greatly injured; and persons whose confidence he was entitled to and did have before that time, by reason of the acts of said defendant, questioned the integrity of said plaintiff and refused to give him the financial credit which they had been accustomed to, and although plaintiff is possessed of a large amount of property over and above all his indebtedness, by reason of the said acts of said defendant, his said creditors became clamorous for their pay, and plaintiff has been caused great embarrassment and has been compelled to make great sacrifices to meet and pay his said creditors, all of which said state of facts were caused by the said acts of said defendant. Plaintiff says by reason of said averments and the disgrace brought upon him he has suffered great distress and pain of mind, and has suffered great loss and damage to his reputation as an honest business man; that he has suffered great pecuniary loss and damage in the manner aforesaid, and he says by reason of the premises

he has sustained damages in the sum of \$50,000." For the sum last named judgment was prayed.

The answer admitted that the defendant was a banking corporation, and that plaintiff was a customer of said bank, and that on September 1, 1889, plaintiff had on deposit in said bank the sum of \$103.50, and the defendant denied all other allegations of the petition. Affirmatively, the defendant answered that about September 20, 1889, plaintiff drew his check on said bank for the sum of \$804.90, payable to John Rush, city treasurer of Omaha, which check was presented for payment on the 23d day of said month, and payment thereof was refused for the reason that the said bank then held a note of Peter Goos dated August 15, 1889, due by its terms in ninety days from its date, and which it had been agreed, as defendant alleged, should be paid out of the proceeds of a mortgage loan (which at the date of the note Goos had in contemplation) whenever said loan should be effected. The defendant further answered that in accordance with said understanding the amount of the note aforesaid was charged against plaintiff when said loan was effected, and the unearned interest upon said note was credited to the account of Goos, and that this charge was afterwards assented to by Goos, and that by reason of charging said note against the account of Goos there was left an insufficient amount to pay his check afterwards given against said account in favor of the city treasurer. The bank further answering denied that the filing of the complaint, and the resulting arrest and imprisonment, and the publication alleged in the petition were the actual and necessary consequences of defendant's refusal to pay the check drawn in favor of said city treasurer, and denied that damages on that account were chargeable to the defendant. The matters affirmatively pleaded in the answer were denied *seriatim* in plaintiff's reply.

During the progress of the trial the parties stipulated as

follows: "It is agreed by the parties hereto for the purposes of this trial that Peter Goos, at the time his check that he gave the city treasurer for \$804.90 was presented for payment and payment thereof refused, had in the defendant's bank, subject to being drawn by him, \$3,625.24, unless the bank was authorized to charge Goos, as the bank did, the amount of his note which was dated August 15, 1889, given for \$3,000, and due in ninety days from date. If the bank had the right to charge Goos with the amount of that note, as they did charge him, then, at the time the check to the city treasurer was presented for payment, the bank was not liable for dishonoring the check. It is not the intention of this stipulation to admit on the part of the defendant that said sum of \$3,625.24 was correct except for the purposes of this action, nor is it the intention of this stipulation to admit any proposition of law, the intention of the parties being simply to save on this trial an accounting of these matters." This stipulation restricted the scope of inquiries to the ground upon which the defendant acted in charging the ninety-day note against the account of the plaintiff whereby arose the insufficiency of funds to pay the check in favor of the city treasurer when it was afterwards presented. The difficulty attending an analysis of the grounds of damage alleged in the petition was met in no way or degree, and to that question our attention must first be directed.

A reference to the averments of the plaintiff relative to the special damages which he claims the right to recover will show that plaintiff alleged that he had been keeping a hotel, whereby he had formed an extensive acquaintance throughout the state of Nebraska and adjoining states among the traveling public, etc. Following these introductory statements is this language: "Plaintiff says by reason of the refusal of said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was or

could be known or determined, the said charge against him and the fact of his said arrest and imprisonment was published in the daily papers of Omaha and sent broadcast over the land in this and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely; and plaintiff's credit was by reason of the premises aforesaid greatly injured," etc. Towards the close of his petition plaintiff alleged that by reason of said premises and the disgrace brought upon him, he had suffered great disgrace and pain of mind, and great loss and damage to his reputation as an honest business man, etc. It is evident that the petition was framed upon the theory that the bank was liable for the arrest and imprisonment of plaintiff and the publication of that fact, whereby his credit was greatly damaged. The trial court, however, very properly held that these matters could not be charged to the bank for the mere refusal to pay the check of the plaintiff, his prosecution and imprisonment, and the published statements in relation thereto not being the natural result of such refusal. (*Sycamore Marsh Harvester Co. v. Sturm*, 13 Neb., 210; *Aultman v. Stout*, 15 Neb., 586.) The action, therefore, as was properly held by the trial court, was maintainable only as one for the loss of credit resulting from defendant's refusal to pay plaintiff's check. While this was the theory to which the court sought to limit the trial of the case, the utmost vigilance could not prevent evidence going to the jury, of the arrest and imprisonment of plaintiff, and of the manner in which these facts were published to the world. The offense charged against Goos, as will be noted in his petition, was that he fraudulently obtained credit by falsely pretending that he had on deposit with the defendant sufficient money to pay the check which he tendered the city treasurer for his taxes. Judge Benecke, one of plaintiff's witnesses, being under examination, was asked as to the arrest of plaintiff and how he learned of it. In the face of an objection, which,

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in view of the innocent appearance of the question, could not be sustained, this witness answered: "I was sitting in my office on Fifteenth and Douglas, and the news-boys were hallooing on the street, "All about Peter Goos' arrest," and I went down the street and bought a newspaper, and to my great astonishment I found that he had given a check to John Rush, the city treasurer, which was not honored." This was followed by other evidence of the same witness, that the fact just sworn to had a very bad effect upon the credit of plaintiff. In the examination of plaintiff himself he was asked: "What did they say about the matter; what did the boys say—the news-boys?" Answer: "All about Peter Goos' arrest; giving a forged check." This evidence was given under a ruling of the court that evidence might be given as to what the news-boys said as to the refusal of the bank to pay plaintiff's check, and how that refusal affected his credit. Immediately following this, plaintiff testified that immediately after his arrest, imprisonment, and the publication above referred to, ten or twelve business men of Omaha, where plaintiff did business, came down that same evening to plaintiff's house and wanted to settle up with him, and asked him what was the matter. In another part of his evidence plaintiff testified that he was arrested because of the refusal of the bank to pay his check. Again, on re-examination, he was asked why he did not go to the bank in answer to a telephone message instead of going home as he did, and he answered, "I did not get the papers; I got arrested; I got pulled in before I reached home." A motion was sustained to strike this out of the record, but that ruling did not probably efface from the minds of the jurors the effect of the testimony. Following this ruling upon the motion to strike from the record the above evidence, plaintiff's counsel offered to prove, without any question pending, that the reason he did not go to the bank was because he was arrested. Upon the final submission of the case the jury was instructed

that the fact Peter Goos had been arrested and imprisoned must not be taken into consideration to enhance his damages. The giving of this instruction was probably all that lay within the power of the court to do in avoidance of the prejudicial effect of the evidence to which we have just made reference, and yet that evidence must necessarily have had a prejudicial effect upon the minds of the jurors. This result was attained through the mistaken zeal of plaintiff's counsel in his endeavor to avoid the effect of the adverse rulings of the court, as to which, if he was aggrieved, he had an ample remedy otherwise than by circumvention.

At best, it is a question more difficult of application than of a general definition to determine what the measure of damages is for the refusal by a bank to pay a check when it has in its hands sufficient funds of the drawer for that purpose. In *Rosewater v. Hoffman*, 24 Neb., on page 230, is found the following language: "It is a well settled rule in this state that punitive; vindictive, or exemplary damages cannot be allowed. The only damages recoverable are denominated 'compensatory,' which are a satisfaction for the injury sustained. (*Boyer v. Barr*, 8 Neb., 70; *Roose v. Perkins*, 9 Neb., 315; *Riewe v. McCormick*, 11 Neb., 263; *Boldt v. Budwig*, 19 Neb., 739.)" In *Brooke v. Tradesmen Nat. Bank*, 69 Hun [N. Y.], 202, it was said that the measure of damages for a refusal to pay a check drawn upon a bank, which had sufficient funds of the drawer for that purpose, was such damages as might fairly and reasonably be considered as arising from a breach of contract according to the usual course of things. The supreme court of Illinois, in *Schaffner v. Ehrman*, 139 Ill., 109, used the following language: "The question therefore is, what is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor? Authorities are not

numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. The leading case is that of *Rolin v. Steward*, 14 Com. Bench [Eng.], 595. In that case there was no evidence of malice in fact nor of special damages; but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks, and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the direction to the jury was correct, the case being likened to that of a slander of a person in the way of his trade. Williams, J., said, 'I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages; and when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury in estimating the damages may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for slander of a person in the way of his trade, the action lies without proof of special damages.' This case was cited with approval in *Prehn v. Royal Bank of Liverpool*, 5 L. R. Exch. [Eng.], 92, in which Martin, B., says, 'Now with respect to damages in general, they are of three kinds: first, nominal damages; \* \* \* the second kind is general damages, and their nature is clearly stated by Creswell, J., in *Rolin v. Steward*, 14 C. B. [Eng.], 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable

man.' In Wood's *Mayne on Damages* [1st Am. ed.], sec. 8, p. 12, the rule is announced, that 'when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damages might be given at once;' citing the case of *Rolin v. Steward*, *supra*. And text-writers, without exception, seem to approve of the rule announced in that case. (See Bishop on Non-contract Law, sec. 49; 1 Sutherland on Damages, 129.) In 3 Am. & Eng. Encyc. of Law, 226, it is said: 'The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but if unable to do so he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained.' (Citing authorities.) 'Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages.' (5 Gen. Digest of the United States, Ann., 283.) Citing *Patterson v. Marine Nat. Bank*, 130 Pa. St., 419, and other authorities." Plaintiff might have relied upon his right to general damages under the above rule, but he did not. Special damages, we believe, are such as by competent evidence are directly traceable to a defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law. The language which we have just quoted at great length probably, as nearly as possible, defines this kind of damages in cases like that under consideration. In the case at bar the attempt to recover special damages was upon allegations and proofs of an unjustifiable dishonor of a check presented by the city treasurer, so confusedly interwoven with the subsequent arrest of the plaintiff, his incarceration, and the newspaper and news-boys' account thereof, that it was impossible in the nature of things for the jury to segregate and ascertain the amount of damages which were solely traceable to the refusal to pay plaintiff's check, independently of the other circumstances to which we have referred. This confusion of matters, which should have

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been kept distinct, seems by plaintiff to have been intensified by working in evidence which the court had repeatedly ruled was inadmissible in proof of recoverable damages. For the reasons given, the judgment of the district court is

REVERSED.

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UNION PACIFIC RAILWAY COMPANY v. JOHN PETER  
MERTES.

FILED FEBRUARY 20, 1894. No. 4651.

1. **Contributory Negligence.** Although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (Reaffirming fourth paragraph of the syllabus in *Union P. R. Co. v. Mertes*, 35 Neb., 204.) Where there is in such a case no evidence of a failure by the defendant to exercise ordinary care a recovery of damages cannot be sustained.
2. ———: **EVIDENCE.** The evidence examined as to this charge of negligence, and found insufficient to justify the submission of that question to the jury.

REHEARING of case reported in 35 Neb., 204.

*J. M. Thurston, W. R. Kelly, E. P. Smith, and John Schomp*, for plaintiff in error:

The plaintiff below was guilty of contributory negligence. There was no evidence to show any failure on the part of the company to do its whole duty. There was therefore no question of negligence on the part of the company to submit to the jury, and the motion to direct a verdict for defendant below should have been sustained. (*Apsey v. Detroit, L. & N. R. Co.*, 47 N. W. Rep. [Mich.], 513; *Hamilton v. Delaware, L. & W. R. Co.*, 50 N. J. Law,

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263; *International & G. N. R. Co. v. Graves*, 59 Tex., 331; Beach, *Contributory Negligence*, pp. 19, 20; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Cincinnati, H. & I. R. Co. v. Butler*, 2 N. E. Rep. [Ind.], 138; *Payne v. Western & A. R. Co.*, 13 Lea [Tenn.], 522; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Ia., 624; *Henzie v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 636; *Pennsylvania R. Co. v. Beale*, 73 Pa. St., 504; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich., 401; *Tucker v. Duncan*, 9 Fed. Rep., 867; *Union P. R. Co. v. Adams*, 33 Kan., 427; *Reading & C. R. Co. v. Ritchie*, 102 Pa. St., 425; *Cogswell v. Oregon & C. R. Co.*, 6 Ore., 417; *State v. Baltimore & O. R. Co.*, 69 Md., 494; *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich., 93; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis., 216; *O'Connor v. Missouri P. R. Co.*, 94 Mo., 150; *Moebus v. Herrmann*, 108 N. Y., 349; *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind., 59; *Pennsylvania R. Co. v. Bell*, 122 Pa. St., 58; *Guggenheim v. Lake Shore & M. S. R. Co.*, 66 Mich., 151; *Norfolk & W. R. Co. v. Burge*, 84 Va., 63; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind., 5; *Candelaria v. Atchison, T. & S. F. R. Co.*, 27 Pac. Rep. [N. M.], 497; *McAdoo v. Richmond & D. R. Co.*, 11 S. E. Rep. [N. Car.], 316; *Tennis v. Interstate C. R. T. R. Co.*, 25 Pac. Rep. [Kan.], 876; *Norfolk & W. R. Co. v. Carper*, 14 S. E. Rep. [Va.], 328; *Spicer v. Chesapeake & O. R. Co.*, 11 L. R. A. [W. Va.], 385; *Union P. R. Co. v. Adams*, 33 Kan., 427; *Baltimore & O. R. Co. v. State*, 16 Atl. Rep. [Md.], 212; *Wright v. Boston & M. R. Co.*, 129 Mass., 440; *Illinois C. R. Co. v. Godfrey*, 71 Ill., 500; *Telfer v. Northern R. Co.*, 30 N. J. Law, 188; *Schofield v. Chicago, M. & St. P. R. Co.*, 8 Fed. Rep., 488; *Wright v. Boston & A. R. Co.*, 142 Mass., 296.)

*Mahoney, Minahan & Smyth* and *H. B. Holsman*, contra:

Although the plaintiff has carelessly exposed himself to an injury, yet if the defendant, after discovering his ex-

posed condition, inflict the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (2 Thompson, Negligence, 1157; *Barker v. Savage*, 45 N. Y., 191; *Brown v. Lynn*, 31 Pa. St., 510; *Northern C. R. Co. v. Price*, 29 Md., 420; *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn., 350; *Nelson v. Atlantic & P. R. Co.*, 68 Mo., 593; *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 Ia., 467; *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Lannen v. Albany Gas-Light Co.*, 44 N. Y., 459; *McKean v. Burlington, C. R. & N. R. Co.*, 55 Ia., 192; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo., 461; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 481; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332; *Cook v. Pickrel*, 20 Neb., 433; *Union P. R. Co. v. Sue*, 25 Neb., 772.)

RYAN, C.

The opinion originally filed in this case was reported in 35 Nebraska on pages 204 *et seq.* A rehearing was granted, and upon full argument we have reached the conclusions which will now be briefly stated. To this end, it is not necessary to review or criticise the syllabus or opinion already referred to. For the purposes of this re-examination they will be assumed to be correct statements of the law applicable to the facts, and the synopsis of the pleadings, proofs, and established facts will be assumed to be correctly stated, except in so far as otherwise hereinafter pointed out. The fourth paragraph of the syllabus states correctly a principle applicable to our inquiries. It was in the following language: "Although a party may have negligently exposed himself to an injury, yet if the defendants, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." At almost the close of the opinion the principle just stated is given the following application: "Even if it be conceded that the plaintiff below

was unlawfully on the track and did not look for an engine before crossing the same, still there is testimony in the record from which the jury would be warranted in finding that after the engineer became aware of the perilous situation of the plaintiff below, he could, by the exercise of ordinary care, have stopped the engine."

Neither in the briefs nor in the oral argument of counsel has evidence been pointed out which justifies this last statement. It is insisted by counsel for defendant in error that while there were two railroad lines admitting of trains passing each other at the point where Mertes was injured, yet that it was fairly inferable from the evidence of Mertes himself that he was upon that particular line over which the engine which injured him was advancing. The evidence of three other witnesses, who were upon the engine, was directly contradictory of this location of Mertes, as it is claimed his evidence justified the jury's above inference in respect thereto. Mertes seems to have been rather awkward in the use of the English language, it is true, and, therefore, in some parts of his evidence left uncertain just where he was just previous to the collision with him. He said that he was walking "between the tracks" which were "two or three yards apart." After this he said he walked "between the railroad." The most that should be claimed by plaintiff in error is that such expressions as "between the railroad" and "between the tracks" were ambiguous. This ambiguity is removed, however, by the statement of Mr. Mertes that these tracks were two or three yards apart. If this was left in any doubt it should have been entirely removed by the further testimony of Mertes that he was walking between the track where the east-bound train and the west-bound train ran. It must, therefore, be accepted as an unquestioned fact that from the time when it was the duty of the employes in charge of the engine of plaintiff in error to note and act with reference to the whereabouts of Mertes, he was moving forward, having at his left the

track upon which, according to his evidence, a Missouri Pacific freight train was moving eastward past him with all the noise incident to the moving of such a train, and with a continuous sound of its bell and whistle. On his right was the track along which, and following him, was advancing the engine to which reference has already been made. The collision is thus graphically described by Mertes in his own peculiar language: "I went on the middle of the two tracks to Sheeley's crossing. I went to go over, you know, and the engine whistled behind me, and I looked back and it caught me and throw me off." Again he said: "It throw me off the track, you know. I was pretty near off the track when it struck me." Later on in giving his testimony his examination was as follows:

Q. Was this engine which struck you making any noise, and if so, what, when it came up?

A. No, sir; it made no noise—no whistle or no bell ring. I looked back and it whistled a little.

Q. How did it whistle?

A. Toot, toot; that is all.

Q. Just as it struck you?

A. Yes, sir.

Naturally this witness could by no possibility give evidence as to what, previous to the accident, was transpiring on the engine, for of that fact the jury could derive knowledge only from the engineer, the fireman, and the pilot, three individuals, whose evidence is concurrent upon these questions. They testified that upon the engineer noticing a man walking alongside the track some distance ahead of where the engine then was, he immediately shut off steam, causing the engine's speed gradually to decrease until Mr. Mertes started to cross the track, when the engine was immediately reversed and the air brake instantly applied, which was all that could be done to suddenly stop the engine, which measures succeeded in that respect so completely that within the distance of the length of the

engine and tender they came to a complete standstill. As to the whistle being sounded, the evidence of these witnesses differed from that of Mertes, for they say that it was sounded by the engineer at Twenty-fourth street (the collision was at Twenty-sixth street, then known as Sheeley's crossing), while the fireman rang the bell. It would seem that the testimony of Mr. Mertes as to the noise caused by the Missouri Pacific train was given with a view to showing that the sounding of the whistle and ringing of the bell on the Union Pacific engine could not be heard or distinguished by Mertes on that account, and that thereby he was excused from the imputation of contributory negligence, which would naturally be imputable to an attempt to cross the track in front of an engine giving such warnings. Possibly this evidence accounted for the failure to hear these warnings so that thereby Mr. Mertes was not liable to the same inference of contributory negligence that might otherwise have been imputed to him. The Union Pacific company's employes having sounded the whistle, rung the bell, and shut off steam, so as to decrease speed, as soon as they discovered that Mr. Mertes, apparently intoxicated, was walking along the side of the track upon which they were running their engine, and afterwards, when he actually stepped upon this track, having, as we have seen, used every available means to stop the engine as quickly as that result could be accomplished, nothing more could be required at their hands. Proof of all these facts being without contradiction, there was no question of negligence upon the part of the railway company to be submitted to the jury, and hence a verdict in support of which that indispensable prerequisite is wanting cannot stand. Let us not be misunderstood. Negligence is a question of fact to be determined by the jury upon the weight of the evidence, as is any other question of fact. When, however, there is no evidence to sustain the essential finding of negligence as against a party sought to be charged there-

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with, the court cannot sustain the verdict. There can be no preponderance of that evidence which is without existence. The judgment of the district court is

**REVERSED.**

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**OMAHA STREET RAILWAY COMPANY V. MATTHEW W.  
CLAIR.**

FILED FEBRUARY 20, 1894. No. 5451.

1. **Review: CONFLICTING EVIDENCE.** Where there is a mere conflict in the evidence and the verdict is not clearly unsupported thereby, the judgment of the trial court will not be reversed merely because in this court it may appear as an original question that the preponderance of proof was with the party other than the one in whose favor the verdict was returned.
2. **Personal Injuries: DAMAGES: INSTRUCTIONS.** In an action to recover damages for injuries charged to have been inflicted by a street railway company, an instruction, designed to embrace all elements essential to a recovery, sufficiently met requirements as to the absence of contributory negligence by requiring the use of "ordinary care and diligence" by plaintiff,—the term "ordinary care and diligence" being subsequently by instructions fully defined.
3. **Negligence: QUESTION FOR JURY: TRIAL.** The jury alone must determine the existence of negligence, contributory or otherwise, as a question of fact, subject to the judgment of the court as to whether or not sufficient proof has been made to justify its consideration, and after the rendition of a verdict, whether or not it is contrary to or unsustained by the evidence. It is not the duty of the trial court to instruct what inferences of fact must or must not be deduced from proofs offered to establish the existence or absence of negligence.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*John L. Webster*, for plaintiff in error, cited: *Warner v. People's Street R. Co.*, 141 Pa. St., 615; *Miller v. St. Paul*

*City R. Co.*, 42 Minn., 454; *Thomas v. Passenger Railway*, 132 Pa. St., 504; *Buzby v. Philadelphia Traction Co.*, 126 Pa. St., 559; *Weber v. Kansas City Cable R. Co.*, 100 Mo., 194; *Belton v. Baxter*, 54 N. Y., 245; *Fenton v. Second Avenue Railway*, 126 N. Y., 625; *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y., 530; *Spencer v. Illinois C. R. Co.*, 29 Ia., 55; *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn., 165; *Cordell v. New York C. & H. R. R. Co.*, 64 N. Y., 538; *Gordon v. Erie R. Co.*, 59 N. Y., 468; *McGrath v. New York C. & H. R. R. Co.*, 59 N. Y., 468; *Havens v. Erie R. Co.*, 41 N. Y., 296; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill., 88; *Cleveland, C. C. & I. R. Co. v. Elliott*, 28 O. St., 340; *Toledo, P. & W. R. Co. v. Riley*, 47 Ill., 514; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill., 102; *McCoy v. Milwaukee Street R. Co.*, 52 N. W. Rep. [Wis.], 93.

*Frank T. Ransom and Gurley & Marple, contra*, cited: *Brooks v. Lincoln Street R. Co.*, 22 Neb., 816; *Anderson v. Minneapolis Street R. Co.*, 42 Minn., 490; *Winter v. Kansas City Cable R. Co.*, 6 L. R. A. [Mo.], 536; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Orange & Newark Horse R. Co. v. Ward*, 47 N. J. Law, 560; *Leavitt v. Chicago & N. W. R. Co.*, 64 Wis., 228; *Copley v. New Haven & Northampton Co.*, 136 Mass., 6; *Williams v. Syracuse Iron Works*, 31 Hun [N. Y.], 292; *Tolman v. Syracuse, B. & N. Y. R. Co.*, 31 Hun [N. Y.], 397; *Texas & P. R. Co. v. Levi*, 59 Tex., 674; *White v. Milwaukee City R. Co.*, 61 Wis., 536; *Hutchinson v. St. Paul, M. & M. R. Co.*, 32 Minn., 398.

RYAN, C.

This action was brought against the Omaha Street Railway Company, and successfully maintained, for the recovery of damages on account of personal injuries sustained by the defendant in error. The allegations of his petition, upon

which the liability of the railway company was predicated in the district court of Douglas county, wherein the judgment was obtained, were made in the following language: "On or about the 24th day of December, 1889, the plaintiff was passing along Fourteenth street in the city of Omaha, at the intersection of Dodge street and Fourteenth street, between the hours of 7 and 8 o'clock in the evening, using due care and caution in passing; that no cars of the said defendant were passing along said street at said time, and without any warning from the servants and agents of said defendant the agents and servants in charge of one of its cars carelessly and negligently drove one of its cars upon and against the plaintiff; that when said car struck the plaintiff he was thrown violently to the ground thereby, and was by the concussion deprived of his senses, and while the plaintiff was endeavoring to escape from off the railway tracks of the defendant, another car of the defendant, being operated by the agents of said company, approached from the east, and the persons in charge of said car saw, or could easily have seen, plaintiff on said track, and while plaintiff was endeavoring to raise himself from said track and remove himself therefrom, and while insensible as aforesaid, the defendant by its agents negligently and carelessly ran its car upon and against the plaintiff and caught the plaintiff in the gearing of said car and carried him for about seventy feet underneath said car; that when the second car struck plaintiff, the iron bolts and gearing of said car were forced into and through the leg of plaintiff at and near his knee, and plaintiff was wounded and bruised and injured to such an extent that he was confined to his bed for six months following, and was caused to expend large sums of money for physicians, and nurse and care, and was caused to expend large sums of money for attention to him during his said confinement because of said wounds and bruises so received. Plaintiff has been by reason of the facts aforesaid deprived of following his usual calling ever since then,

and has suffered great bodily pain and mental anguish; that the wounds so received by plaintiff through the negligence and carelessness of the defendant have rendered him a cripple for life, and he has been damaged in the sum of \$25,000." For this sum named he prayed judgment. The railway company by its answer admitted that it was a corporation operating a street railway, and that the plaintiff was injured at about the time and place alleged, but denied every other allegation of the petition. In the answer it was further alleged that the injuries complained of were attributable solely to the carelessness and negligence of plaintiff, and that if plaintiff at the time of said injury had been exercising due and reasonable care he would not have been injured. By the reply there was a denial of negligence and want of care on the part of plaintiff.

Consistently with the averments of the petition, three witnesses, one of whom was the plaintiff, testified that the forward car in the cable train going eastward on Dodge street had no head-light or other light making the train visible at the time of the injury complained of, and with different degrees of positiveness these three witnesses testified that no audible warning was given of the approach of the said east-bound train. The testimony of plaintiff and one of these witnesses was that plaintiff attempted to cross Dodge street from the south at its intersection with Fourteenth street; that he was not warned of the approach of the east-bound cable train, and could neither see nor hear it, and that when crossing the most southerly of the two parallel tracks running lengthwise of Dodge street, he was struck by the east-bound train approaching on said track; that he was thereby stunned and rendered incapable of exercising due caution and avoiding contact with another cable train approaching from the east on the most northerly of the two parallel tracks referred to, though plaintiff admitted in his evidence that he had, just before being struck, noticed the near approach of the west-bound train,

carrying a head-light and thereby rendered visible. Plaintiff and one of his witnesses further gave evidence that after plaintiff was struck by the east-bound train, and in the dazed condition resulting from said collision, he attempted to cross the northernmost of the two parallel tracks on Dodge street. The evidence of the plaintiff and the two witnesses above referred to was that he was struck by the westward-bound train and borne down beneath the advance car thereof and thus sustained very serious injuries. The evidence on behalf of the defendant, given by eight witnesses, was that the eastward-bound train met that bound westward on Dodge street at some point between Fourteenth and Fifteenth streets, and that there was a head-light on the eastward-bound train, and that the ordinary signal for a crossing was given by means of a bell before the east-bound train reached Fourteenth street, and as soon as it became apparent, when the front of the train had nearly reached a point opposite where the plaintiff was standing, just south of the car track, that plaintiff was about to cross in front of the moving train last mentioned, a danger signal was at once given and that the train was stopped before it traversed a distance of fifteen feet, but too late to avoid a collision with plaintiff, who had meantime stepped upon the track in front of the eastward-moving train; that the effect of this collision was to throw the plaintiff under the forward car in the eastward-bound train where he sustained the injuries complained of. It is useless to attempt to harmonize the testimony, for, as will be very readily seen, it is contradictory at all points, even as to the identity of the train with which plaintiff collided. The jury evidently believed the version given by plaintiff's witnesses, though said witnesses were numerically in the minority. As this verdict was not without support of competent testimony, and as the trial judge, who had opportunity for observation of the witnesses which is denied us, refused to interfere with it, thereby adding his

sanction to the jury's estimate of the weight of the evidence upon which it was founded, we cannot interfere solely on the ground of the insufficiency of the evidence in support of the verdict.

It is insisted, however, by plaintiff in error, that instructions numbered 1, 9, and 10, given at the request of the defendant in error, stated the law incorrectly as applicable to the facts in controversy. The same objections are made to each of these instructions. It will therefore be necessary only to quote the first referred to, especially in view of the fact that it was selected as a sample instruction against which objections are specifically urged. This instruction is in the following language:

“1. If you believe from the evidence that at the time of the collision between the plaintiff and the defendant's cars, plaintiff was endeavoring to cross Dodge street, and that he was using ordinary care and diligence at the time; that the defendant's agents in charge of the east-bound train did not give any alarm of the approach of said train, and that said train had no head-light thereon, and no warning whatever was given to plaintiff of the approach of said train, and plaintiff did not know of the proximity of said train, and that said train struck the plaintiff and threw him against the pavement and he was thereby stunned to such an extent that he did not have control of his actions, and while in that condition plaintiff endeavored to cross the north track of the defendant, and while so endeavoring to cross said track the west-bound train of the defendant collided with the plaintiff and plaintiff was thereby injured, you will find for the plaintiff, provided you further find from the evidence that the accident would have been prevented and the plaintiff would not have been struck by the east-bound train if the defendant's servants in charge of said east-bound train had given an alarm of the approach of said train the plaintiff could have seen said train in time to escape it had there been a head-light thereon.”

It is argued that the language in the above instruction, "and plaintiff did not know of the proximity of said train," excuses from responsibility for knowledge of the proximity of the train which by the exercise of due and ordinary care plaintiff could have obtained. To this objection, as well as to another, that this clause ignores the question of contributory negligence, it is deemed a sufficient answer to call attention to the fact that this very instruction states as one of the essentials of defendant's liability that plaintiff "was using ordinary care and diligence" at the time the accident occurred. What was ordinary care and diligence was explained in the fourth instruction given by the court in the following language:

"4. You will therefore inquire, in the second place, if you shall find in favor of the plaintiff upon the first proposition, whether or not the plaintiff was himself in the exercise of due and reasonable care at the time he received his injuries, for if by the exercise of reasonable care the plaintiff could have avoided the injury, then he is not entitled to recover in this action, notwithstanding you may believe from the evidence that the employes of the defendant in charge of the cars were guilty of negligence in the operation of the cars."

Upon the suggestion of the plaintiff in error, the court further elaborated this question by instructions numbered 3, 4, 5, and 8, which are in the following language:

"3. The jury are instructed that even if you believe from a consideration of all the evidence that the train which approached from the west was going eastward on Dodge street did not have a head-light on the front end of the front grip car, still the plaintiff could not recover if by the use of his eye-sight and hearing he could have seen or known that such train was approaching, by the use of ordinary care on his part, and that if he failed to use ordinary precautions to ascertain whether such train was approaching, then he was guilty of contributory negligence and cannot recover.

“4. The jury are instructed that in determining whether the plaintiff was guilty of contributory negligence, and in determining whether he could not have seen or heard the approaching train from the west, you should take into consideration that part of the evidence relating to gas-lights and electric lights at the intersection of Fourteenth and Dodge streets and determine from all the evidence upon that point whether there was sufficient light for the plaintiff to have seen the approaching train from the west in time to have avoided the collision with him, and if from the whole evidence you find that there was sufficient light so that by the use of ordinary care he could have seen the approaching train, then it was his duty to have avoided stepping upon the track in front of the approaching train, and such failure to avoid the train on his part constitutes contributory negligence which would prevent any recovery by him in this action.

“5. The jury in determining whether the plaintiff was guilty of contributory negligence may take into consideration the condition of the plaintiff as to intoxication, and if you find from the evidence that the plaintiff was intoxicated, and that his failure to see the approaching train or to avoid the approaching train was by reason of his intoxication, then he was guilty of such contributory negligence as prevents a recovery in this case, and your verdict should be for the defendant.”

“8. The jury are instructed that if you believe from the evidence that the plaintiff stepped in front of the moving train and in such close proximity to the train that it could not be brought to a stop before colliding with the plaintiff, and that after colliding with plaintiff the train was brought to a stop as speedily as possible, then the defendants were not guilty of any negligence in that regard,” [modified by the court by adding] “unless you find from the evidence that there was no head-light on the forward car, and that no signal of the approach of the train was given,

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and that by reason of the absence of such head-light and signal the plaintiff had no knowledge of the approach of the train, and could not by the exercise of ordinary care and prudence have discovered the approach of the train, and that under such circumstances the plaintiff stepped in front of the train and received his injuries, then, and in such case, the plaintiff could not be charged with contributory negligence in stepping in front of the train, and the defendant would be chargeable with negligence."

In view of these instructions, plaintiff in error had no ground to complain that the term "ordinary care and diligence," and the nature and effect of contributory negligence, were not explained to the jury as favorably as the law on these subjects would justify. The remainder of the argument of plaintiff in error is devoted to deductions to be drawn from the absence of a head-light, etc., as constituting negligence sufficient to require that the trial court should have instructed that the various factors named were sufficient or not, *per se*, to constitute negligence or contributory negligence. It is believed that the following paragraph of the syllabus of the opinion in the case of *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 29, filed during this term of court, states correctly the rule upon the subject of negligence in what manner soever it may arise:

"10. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper for the trial court to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence. At most, the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence."

The judgment of the district court is

AFFIRMED.

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SOPHIA F. LARSON, APPELLANT, v. J. B. DICKEY ET  
AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5196.

1. **Constitutional Law: TAX DEEDS.** The legislature has the power to make a tax deed *prima facie* evidence that every requirement of the law necessary to its validity has been complied with.
2. ———: ———. The legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely.
3. ———: ———. The legislature has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property, for non-payment of taxes.
4. ———: **TAXATION: TAX SALES: EVIDENCE.** The constitution of this state has not committed to the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for non-payment of taxes. Such determination belongs to the judiciary.
5. **Tax Deeds: EXECUTION: TREASURER'S SEAL.** There is no such thing as a county treasurer's official seal of office provided for or recognized by the laws of this state, and until the legislature shall provide for an official seal for county treasurers, no tax deed of any validity can be executed under the present revenue law.
6. **Constitutional Law: TAX DEEDS: EVIDENCE.** The legislature has no power to make a tax deed conclusive evidence that the grantee named therein was the purchaser or assignee of the purchaser at the sale for taxes on which said deed is predicated.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The opinion contains a statement of the case.

39	463
42	322
43	406
39	463
44	92
39	463
45	849
39	463
46	425
39	463
48	172

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*James B. Meikle and George W. Covell, for appellant:*

The appellant contends that she has a right to show by the tax list that the delinquent taxes for the year 1885 were not carried forward upon the tax list of 1886, and in consequence thereof that the appellant had no notice the taxes for the year 1885 were delinquent. The provision of section 130, chapter 77, Compiled Statutes, which provides that a tax deed shall be conclusive evidence of the following facts is unconstitutional and void for the reason that it is in conflict with the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law: That the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; that the grantee named in the deed was the purchaser or his assignee; that all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing or valuation of the property up to the execution of the deed inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in said section, wherein the deed should be presumptive evidence only. (*McCready v. Sexton*, 29 Ia., 359; *Groesbeck v. Seeley*, 13 Mich., 329; *Case v. Dean*, 16 Mich., 13; *White v. Flynn*, 23 Ind., 46; *Smith v. Cleveland*, 17 Wis., 556\*; *Allen v. Armstrong*, 16 Ia., 508; *People v. Mitchell*, 45 Barb. [N. Y.], 212; Blackwell, Tax Titles, p. 98; *Abbott v. Lindenbower*, 42 Mo., 162, 46 Mo., 291; *Wantlan v. White*, 19 Ind., 470; *Huntington v. Brantley*, 33 Miss., 451.)

The tax deed is void because it does not contain a recital showing where the tax sale was had. (*Haller v. Blaco*, 10 Neb., 36; *Shelley v. Towle*, 16 Neb., 194; *Baldwin v.*

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*Merriam*, 16 Neb., 199; *Taylor v. Courtney*, 15 Neb., 198; *Towle v. Holt*, 14 Neb., 227.)

"If a tax deed fails to show that it was made at the place required by law, it is void." (*Howard v. Lamaster*, 11 Neb., 582.)

*Saunders & Macfarland, contra:*

In conformity with the well known principle that those matters over which the legislature has exclusive authority may be required or omitted at its pleasure, it must follow that if the legislature has power to require taxes for the previous year to be entered on the book of subsequent years or not at its discretion, then it has the right to make deeds conclusive evidence of that fact. (Black, Tax Titles, sec. 253.)

The mode of levying, assessing, and collecting taxes is entirely subject to the discretion of the legislature. (*Smith v. Cleveland*, 17 Wis., 556\*.)

The manner of the listing and assessing, failure to make entries on proper book, or the failure to list or assess the property within the time provided by law are not jurisdictional matters, and are mere irregularities. (Sec. 142, ch. 77, Comp. Stats.)

A tax deed may be made conclusive evidence of the regularity of all proceedings, and of all matters except the facts of a levy, an assessment, or sale; and it may be conclusive evidence of the regularity of such levy, assessment, or sale. (2 Blackwell, Tax Titles, secs. 850, 851, 852, 853; *Gould v. Thompson*, 45 Ia., 450; *Callanan v. Hurley*, 93 U. S., 387; *Shawler v. Johnson*, 52 Ia., 472; *Phelps v. Meade*, 41 Ia., 473; *Easton v. Perry*, 37 Ia., 681; *Madsen v. Sexton*, 37 Ia., 562; *Clark v. Thompson*, 37 Ia., 536; *Hurley v. Powell*, 31 Ia., 64; *Leavitt v. Watson*, 37 Ia., 93; *Martin v. Cole*, 38 Ia., 141; *Robinson v. First Nat. Bank*, 48 Ia., 354; *Jenkins v. McTigue*, 22 Fed. Rep., 148; *Smith v. Cleveland*, 17 Wis., 556\*.)

It is competent for the legislature to make tax deeds *prima facie* evidence of title in the holder, and to place the burden of proof upon the party attacking such title. (*Delaplaine v. Cook*, 7 Wis., 44; *Genther v. Fuller*, 36 Ia., 604; *Turnny v. Yeoman*, 14 O., 207; *Stanbery v. Sillon*, 13 O. St., 571; *Hoffman v. Bell*, 61 Pa. St., 444; *Hand v. Ballou*, 12 N. Y., 541; *Pillow v. Roberts*, 13 How. [U. S.], 472; *Keely v. Sanders*, 99 U. S., 441; *De Treville v. Smalls*, 98 U. S., 517; *Falkner v. Guild*, 10 Wis., 506; *Stewart v. McSweeney*, 14 Wis., 507; *Whitney v. Marshall*, 17 Wis., 181; *Smith v. Cleveland*, 17 Wis., 556\*.)

A person must be in the actual possession of the premises in order to entitle him to a notice to redeem; constructive possession is not sufficient. (*Parker v. Cochran*, 64 Ia., 757; *Tuttle v. Griffin*, 64 Ia., 455; *Burdick v. Connell*, 69 Ia., 458.)

A comparison of the deed with the statute will show that the deed is in strict conformity with section 127, chapter 77, Compiled Statutes, and has been executed in the manner and form provided by law. The appellant contends that the county treasurer had no authority to provide himself with a seal; but under the statute the county treasurer had authority by implication to provide himself with one. (*Hendrix v. Boggs*, 15 Neb., 472.)

If a form is given by statute and is followed, it must be held sufficient. (Cooley, Taxation [2d ed.], p. 515; *Hubbell v. Campbell*, 56 Cal., 527; *Grimm v. O'Connell*, 54 Cal., 522; *Geekie v. Kirby Carpenter Co.*, 106 U. S., 379; *Martin v. Garrett*, 30 Pac. Rep. [Kan.], 168; *Bell v. Gordon*, 55 Miss., 45.)

Proceedings for the collection of delinquent taxes, and sale of the property by summary process, are not obnoxious to the constitutional provisions as to due process of law. (*Pritchard v. Madren*, 4 Kan., 486; *Murray v. Hoboken Land & Improvement Co.*, 18 How. [U. S.], 272; *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. City of New Or-*

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*leans*, 96 U. S., 97; *Springer v. United States*, 102 U. S., 586; *Bennett v. Hunter*, 9 Wall. [U. S.], 326; 2 Desty, Taxation, pp. 749-753; Cooley, Taxation, p. 464; 1 Blackwell, Tax Titles, sec. 75.)

RAGAN, C.

During the year 1885, and until October 14, 1886, one Marcus P. Mason owned lots 11 and 12 in block 4, Kilby Place, in the city of Omaha, Nebraska. On said last date Mason sold, and by warranty deed conveyed, said premises to Sophia F. Larson. These lots were assessed for taxes in the name of Mason for the year 1885, and on the 6th day of November, 1886, were sold at the county treasurer's public tax sale for the taxes of 1885, to one Dickey, who afterwards, on the 20th day of November, 1888, obtained a treasurer's tax deed for the property, based on the sale made thereof in 1886, for the delinquent taxes for the year 1885. This suit was brought in the district court of Douglas county, by Mrs. Sophia F. Larson against J. B. Dickey, the holder of the tax deed, and James M. Taylor, his lessee, for the purpose of canceling said tax deed. In her petition Mrs. Larson tendered Dickey the amount which he had paid for the tax title, together with interest and costs. Both parties submitted their title to the court. The court found and decreed that the tax deed was valid and divested Mrs. Larson of her title to the property. From this decree Mrs. Larson appeals to this court.

Section 86 of the revenue act of 1879, chapter 77, Compiled Statutes, 1893, provides: "In all cases where taxes are delinquent on any real property, for any preceding year, or years, it shall be the duty of the county clerk in making up the list for the current year, to enter the amount of the delinquent tax opposite the tract or parcel of real property against which it was charged, in a suitable column or columns, with the year or years in which the same was due, and the amount thereof shall be collected in like

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manner as tax for other real property of that year may be collected."

On the trial in the district court Mrs. Larson offered to prove by competent evidence that when the 1886 tax was extended against this property by the county clerk the delinquent taxes against the same for the year 1885, and for which it had been sold, were not carried forward on the tax list and entered as delinquent against the property with the taxes assessed thereon for the year 1886. The district court excluded this evidence on the theory, as appears from a copy of the court's opinion found in the brief of counsel for the appellant, that section 130 of this revenue law made the tax deed conclusive evidence that the requirement of said section 86 had been complied with. Said section 130 is in words and figures as follows:

"Sec. 130. Deeds made by the county treasurer as aforesaid shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: 1. That the real property conveyed was subject to taxation for the year or years stated in the deed; 2. That the taxes were not paid at any time before the sale; 3. That the real property conveyed had not been redeemed from the sale at the date of the deed; 4. That the property had been listed and assessed; 5. That the taxes were levied according to law; 6. That the property was sold for taxes as stated in the deed; 7. That notice had been served and due publication had, as required in section 123 of this chapter, before the time of redemption had expired. And it shall be conclusive evidence of the following facts: 1. That the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; 2. That the grantee named in the deed was the purchaser or his assignee; 3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or

action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only. And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer, the person claiming the title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid; *Provided*, That in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; *Provided further*, That in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the

same, and if fraud is so established such sale and title shall be void."

The learned judge of the district court was right in holding that this section made the tax deed conclusive evidence that the requirements of said section 86 had been complied with; but is this section 130 constitutional in so far as it makes the tax deed conclusive evidence that the thing was done which it is here sought to prove, and, as a matter of fact, was not done?

At common law, it was necessary that one who claimed to have obtained title to property of another under proceedings based upon a neglect of public duty, should take upon himself the burden of showing that the law had been complied with by those who had had the proceedings in charge; especially if the proceedings would operate with severity and be in their effects something in the nature of a forfeiture. The law was strict in its requirements that his evidence should exhibit the proceedings, from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. This rule of the common law has not been modified by the decisions and is still recognized and enforced where statutes have not changed it. (Cooley, Taxation, p. 326.) It will be observed that this section 130 of our revenue law makes the tax deed *prima facie* evidence that certain requirements of the revenue law, leading up to the sale of property for taxes, have been complied with, thus casting the burden on the one assailing the validity of a tax deed of showing that such requirements had not been complied with; and said section 130 also makes the tax deed conclusive evidence that every fact existed; that everything had been done and every requirement of the law complied with necessary to the validity of the deed, except those requirements whose performance are made *prima facie* evidence.

It is said by counsel for appellant that section 130 is

repugnant to the constitution, in that in making the tax deed conclusive evidence of certain matters, it deprives the citizen of his property without due process of law. The question is an intensely interesting one, and we have tried to give it such time and attention as its importance deserves, but it would extend this opinion to an unreasonable length to quote and comment upon all the cases examined in its investigation. I have no doubt, however, that the following propositions are established by the weight of authority in this country.

1. That the legislature has power to make tax deeds *prima facie* evidence that every requirement of the law necessary to their validity has been complied with. (Black, Tax Titles, sec. 449, and cases there cited; Cooley, Constitutional Limitations, p. 458; *Raley v. Guinn*, 76 Mo., 263; *Abbott v. Lindenbower*, 42 Mo., 162; *Callanan v. Hurley*, 93 U. S., 387.)

2. That the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory and which pertain to the regulation or the manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely. (Black, Tax Titles, sec. 452, and cases there cited; *Allen v. Armstrong*, 16 Ia., 508.)

3. That the legislature has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for the non-payment of taxes. (*Bannon v. Burnes*, 39 Fed. Rep., 892; *Marx v. Hanthorn*, 30 Fed. Rep., 579; *Abbott v. Lindenbower*, 42 Mo., 162; *Wantlan v. White*, 19 Ind., 470; *White v. Flynn*, 23 Ind., 46; *McCready v. Sexton*, 29 Ia., 356; *Allen v. Armstrong*, 16 Ia., 508; *Groesbeck v. Seeley*, 13 Mich., 330; *In re Douglass*, 41 La. Ann., 765.)

4. The constitution of this state has not committed to

the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizen's property for the non-payment of taxes. Such determination belongs to the judiciary.

The authorities establishing the foregoing propositions lead us to the conclusion that the requirement found in said section 86, that the county clerk should enter the delinquent tax of 1885 against these lots on the tax list of 1886, is one not jurisdictional or vital to the exercise of the powers of taxation or sale, and one that the legislature might have dispensed with altogether, and of the performance of which the legislature could make the tax deed conclusive evidence, and that, therefore, the court did not err in refusing to permit Mrs. Larson to prove that the county clerk did not in fact comply with said section 86.

The next error assigned by the appellant is that the district court erred in admitting in evidence the tax deed sought to be canceled by this suit. The objections made to this deed are as follows: (1) That it does not show where the tax sale was held; (2) that it does not show for the taxes of what year the property was sold; (3) that it does not show for what amount the property was sold; (4) that it is not witnessed; (5) that there is no seal of any court attached thereto; (6) that the deed is not acknowledged; (7) that it does not purport on its face to have been executed by the county treasurer of Douglas county, Nebraska; (8) that it does not show to whom the property was sold; (9) that it is not attested by the seal of any person authorized by law to use a seal. The deed was as follows:

"STATE OF NEBRASKA, }  
DOUGLAS COUNTY. }

"Whereas, at a public sale of real estate for the non-payment of taxes, made in the county aforesaid, on the fourth (4th) day of November, A. D. 1886, the following

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described real estate was sold, to-wit: Lots eleven (11) and twelve (12), in block four (4), in Kilby Place addition to the city of Omaha, as surveyed, platted, and recorded;

"And whereas, the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the state of Nebraska necessary to entitle J. B. Dickey to a deed of said real estate:

"Now, therefore, know ye, that I, Henry Bollin, county treasurer of said county of Douglas, in consideration of the premises, and by virtue of the statutes of the state of Nebraska in such cases provided, do hereby grant and convey unto J. B. Dickey, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

"Given under my hand and the seal of our court, this 20th day of November, A. D. 1888.

"[SEAL.]

HENRY BOLLIN,

"*County Treasurer.*"

In support of the first objection made by the appellant, we are cited to the following cases: *Haller v. Blaco*, 10 Neb., 36, *Howard v. Lamaster*, 11 Neb., 582, *Thompson v. Merriam*, 15 Neb., 498, and *Shelley v. Towle*, 16 Neb., 194. These authorities do say that if a tax deed fails to show that the tax sale was made at the place required by law, that the deed is void; but it must be borne in mind that these decisions were rendered under the revenue law of 1869. Section 56 of that law, as section 109 of the revenue law of 1879, required the county treasurer to hold the sales of lands made by him for unpaid taxes "at the court house, or the place of holding court in his county, or at the treasurer's office." But the form of the tax deed prescribed by section 68 of the revenue act of 1869 required a recital in such deed of the place where the tax sale was held. This requirement is not in the form of tax deed prescribed by section 127 of the revenue act of 1879,

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the section on which the tax deed in suit is based. The cases cited above from this court are, therefore, not applicable to the case at bar.

Again, the subject-matter of objections Nos. 1, 2, and 3 as well, embraces facts of the performance of which, according to law, we have seen it was competent for the legislature to make the tax deed conclusive evidence. As these objections assail the deed only on that ground, they are untenable.

We will consider objections Nos. 4 and 6 together. The revenue law of 1866 required that a tax deed should be executed by the county treasurer under his hand, and the execution thereof attested by the county clerk with the county seal, and that such tax deed should be acknowledged. By this law not only was the tax deed required to be witnessed, but the law specified the witness. Section 68 of the revenue law of 1869 contained precisely the same provision. The revenue law of 1879, the one under consideration, is substantially a re-enactment in most respects of the acts of 1866 and 1869, but in the act of 1879 section 68 of the act of 1869 was left out, and in its place was put section 221 of the revenue act of 1873 of the state of Illinois, which is our section 127, chapter 77, Compiled Statutes of 1893, and is as follows:

“Sec. 127. The deed so made by the county treasurer under the official seal of his office shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title of the property therein described, without further acknowledgment or evidence of such conveyance, and said conveyance shall be substantially in the following form:

“STATE OF NEBRASKA, ——— COUNTY. Whereas, at a public sale of real estate for the non-payment of taxes made in the county aforesaid, on the ——— day of ———, A. D. 18—, the following described real estate was sold, to-wit: (here place description of real estate conveyed); and whereas,

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the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the state of Nebraska necessary to entitle (insert him, her, or them) to a deed of said real estate: Now, therefore, know ye, that I, —, county treasurer of said county of —, in consideration of the premises, and by virtue of the statutes of the state of Nebraska in such cases provided, do hereby grant and convey unto —, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

“Given under my hand and the seal of our court this — day of —, A. D. 18—.

“— —, *County Treasurer.*”

The only difference in this section and said section 221 of the Illinois statute is this: The word “Nebraska” has been substituted for the word “Illinois,” and the word “treasurer” for the word “clerk.” The law of Illinois in force at the date of the enactment of the statute of which said section 127 of our revenue act is a copy, required the execution of all conveyances of real estate to be acknowledged or proved, in order to entitle such conveyance to be recorded, and thus become of themselves evidence, but did not require the signature of the grantor to a real estate conveyance to be witnessed. The conveyance was entitled to record if acknowledged by the grantor or his signature proved; hence the language of this section 221, our 127: “That the deed so made by the county treasurer \* \* \* shall vest in the grantee \* \* \* the title of the property \* \* \* without further acknowledgment or evidence of such conveyance.” Now, the object of statutes requiring conveyances of real estate to be acknowledged is to make them evidence without extraneous proof of their execution, and to entitle them to be recorded, thus perpetuating them as evidence. The acknowledgment, however, is not part of a deed. (*Burbank v. Ellis*, 7 Neb., 157.)

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But to entitle a deed to be acknowledged, and thus made of itself evidence, it must first be executed (and this execution proved) as the statute provides. Our statute on the subject of the execution of real estate conveyances, section 1, chapter 73, Compiled Statutes, 1893, provides: "Deeds of real estate or any interest therein in this state, except leases for one year or for a less time, if executed in this state, must be signed by the grantor or grantors, being of lawful age, in the presence of at least one competent witness, who shall subscribe his or her name as a witness thereto, and be acknowledged or proved and recorded as directed in this chapter." With this statute before us, and bearing in mind that the revenue acts of this state prior to the act of 1879 required the execution of tax deeds to be witnessed and acknowledged in order to entitle them to record, and thus make them evidence, can it be said our legislature intended to do away with these requirements because of the interpolation of this section 221 of the Illinois statute into our revenue act? Had the revenue acts of 1866 and 1869 been silent on the subject of witnessing and acknowledging of tax deeds, it seems that the general statute on the subject of the execution, witnessing, and acknowledging of conveyances of real estate would have been applicable to tax deeds made under said acts. (*Heelan v. Hoagland*, 10 Neb., 511; *Stierlin v. Daley*, 37 Mo., 483; *Tilson v. Thompson*, 27 Mass., 359.)

The language of section 127 should be strictly construed in favor of the citizen, the title to whose property is sought to be divested by a tax deed. It is said in said section that "the deed so made by the county treasurer \* \* \* shall vest in the grantee \* \* \* the title of the property \* \* \* without further acknowledgment or evidence of such conveyance." Now, every conveyance of real estate can only be recorded when acknowledged, and can only be acknowledged when the signature of the grantor is witnessed or proved. The words "without further ac-

knowledge or evidence," it would seem, ought not in this case to be construed to read: "Without any acknowledgment or evidence of such conveyance;" especially in view of our statutes, by which the holder of a void tax deed is subrogated to the lien of the public for taxes on real estate, and by which the holder is allowed to foreclose his lien in equity against the property, and thus acquire, if the same be redeemed, a large return on his investment, and if not redeemed, an indefeasible title to the property. Since the decree must be reversed on another ground, we do not decide whether the failure to witness or acknowledge the deed renders it void.

Objection No. 7, made to this tax deed, is untenable. True, the words "of Douglas county, Nebraska" do not follow the signature "Henry Bollin, county treasurer," but the deed is headed "State of Nebraska, Douglas county," and in it is the statement "I, Henry Bollin, county treasurer of said Douglas county," etc. This is sufficient, so far as the objection made is concerned.

We next direct our attention to objections Nos. 5 and 9. The substance of these objections is that the deed of the treasurer shows that it was not executed under the official seal of his office. The copy of the deed in the bill of exceptions recites: "Given under my hand and the seal of our court, this 20th day of November, A. D. 1888. [Seal.] Henry Bollin, County Treasurer." It will be observed that this is the exact language of the form of tax deeds provided for by section 127 quoted above from our revenue act, and which is, as already stated, a copy of section 221 of the Illinois revenue act of 1873. By the statute of Illinois in force when this section 221 was enacted, the collector of taxes brought a proceeding or suit in the county court against all the property and the parties in whose name the same was listed on which taxes were delinquent, and gave notice by publication in a newspaper that at a certain term of the county court he would apply for judgment against

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such property and persons for the unpaid taxes and for an order of the court for a sale of the property. At the term fixed by the notice, the taxes against any piece of property remaining unpaid, and no defense being interposed to the collector's proceeding, the county court rendered judgment against the property for the unpaid taxes and an order that the collector sell. The statutes also made the county court a court of record, and the county clerk the clerk thereof, and required all tax deeds to be executed by the county clerk under the official seal of his office, which seal of the county clerk became and was, by virtue of the statute, the seal of the county court. This explains the words "under the official seal of his office," and the words "the seal of our court," found in section 127 of our law. It is our duty to give effect to this section 127 if possible, but by any construction it makes it the duty of the county treasurer to execute tax deeds under the official seal of his office. But there is no such thing as the county treasurer's official seal of office provided for or recognized by our statutes, and until the legislature shall provide for an official seal for county treasurers, they cannot execute tax deeds of any validity under the present law. If the legislature had so provided for an official seal for county treasurers, and if this tax deed had been attested by such seal, the court might regard the words "of our court" as surplusage, and thus give effect to the law; but under the name of "construction," we cannot read out of this section the words "under the official seal of his office," for this would be, in effect, legislation. From the copy of the tax deed in the record we do not know what seal or kind of seal was used by the treasurer, but it is wholly immaterial, as he could not lawfully use any. It follows that objections Nos. 5 and 9 were well taken and should have been sustained.

It remains to consider objection No. 8. It will be observed that said section 130, quoted above, makes the tax deed conclusive evidence of the fact that the grantee named

in the deed was the purchaser, or his assignee, of the property at the tax sale. Is it within the power of the legislature to make this tax deed conclusive evidence of such fact? We do not think it is. Suppose this property had been sold to John Doe and a certificate of sale issued to him, and the same had been lost or stolen, and an indorsement of his name forged thereon under a false assignment of the certificate to Richard Roe, and he had presented the certificate and obtained the tax deed. In a suit by Doe to recover this land no lawyer would contend that the tax deed would be conclusive evidence for Roe of his rightful ownership, nor that the legislature could make it such. We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property. (*Wright v. Cradlebaugh*, 3 Nev., 341.) There are fixed bounds to the power of the legislature over the subject of evidence, which must not be exceeded. As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights. (Cooley, *Constitutional Limitations* [4th ed.], 457.) While the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even a legislature cannot do. Due process of law is not any process which legislative power may devise. (*Bannon v. Burnes*, 39 Fed. Rep., 892; *Wantlan v. White*,

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Omaha Street R. Co. v. Elkins.

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19 Ind., 470.) Does it alter the case that the suit is by the owner whose title is sought to be divested by tax deed? This deed is, as we have already seen, void for several reasons, but, under our statute, the lawful owner of it is entitled to a lien on this property for taxes paid at the sale and since. Is this deed conclusive evidence that this holder is the one entitled to such lien? Had Dickey brought this suit to foreclose his lien, alleging his tax deed to be void, and Mrs. Larson had answered denying, as she might lawfully have done, Dickey's ownership of the lien, would this tax deed have been conclusive evidence that Dickey was the lawful owner? We think not. It follows that the decree of the district court must be reversed and the cause remanded with instructions to that court on payment by Mrs. Larson of the taxes and expenses, the tender of which was made in her petition, to enter a decree canceling the said tax deed and lease of the appellees, and quiet and confirm the title to said real estate in appellant.

REVERSED AND REMANDED.

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OMAHA STREET RAILWAY COMPANY V. SAMUEL  
ELKINS.

FILED FEBRUARY 20, 1894. No. 5576.

**Admissibility of Testimony Given at Former Trial.**

Where a witness is shown to be absent from the state, his testimony given at a former trial of the cause is admissible in evidence, if otherwise unobjectionable. RAGAN, C., dissenting.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

*John L. Webster*, for plaintiff in error:

Where a witness is beyond the jurisdiction of the court, his testimony given at a former trial between the same parties, with reference to the same subject-matter, is admissible in evidence. (*City of Omaha v. Jensen*, 35 Neb., 68; *McGill v. Kauffman*, 4 S. & R. [Pa.], 316; *Carpenter v. Groff*, 5 S. & R. [Pa.], 162; *People v. Devine*, 46 Cal., 45; *Lowe v. State*, 86 Ala., 47; *Sneed v. State*, 47 Ark., 180; *Parker v. State*, 24 Tex. App., 61.)

*E. T. Farnsworth*, contra.

IRVINE, C.

On the trial of this case in the district court the defendant called to the stand the stenographic reporter, produced a transcript of the testimony of a witness given at a former trial of the same action, and offered to prove and introduce in evidence such testimony. The offer was objected to, as incompetent, irrelevant, and immaterial, because the witness might now testify differently, and because there was no authority for introducing the testimony of the witness given at a former trial. The objection was sustained and the evidence excluded. The defendant had asked for a continuance of the case upon a showing properly made that the witness had removed to another state and was out of the jurisdiction of the court. The motion had been overruled, and we think properly so, for want of sufficient showing of diligence on the part of the defendant. The exclusion of the witness' former testimony is assigned as error, and the question presented is, whether the testimony of a witness given upon a former trial of the same case is admissible in evidence simply upon a showing that the witness is out of the jurisdiction and beyond reach of the court's process. Since the trial of the case in the district court the question has been decided by this court, and such

testimony held to be admissible. (*City of Omaha v. Jensen*, 35 Neb., 68.) The question in that case was complicated with collateral features to which the arguments chiefly directed the attention of the court. All that is there said upon the point is as follows: "Christensen is shown to have been absent from the state, and his testimony on a former trial, if otherwise unobjectionable, is admissible." While we think that decision is correct and adhere to it, the manner in which the question was there treated justifies us in now making a more thorough examination than was there demanded.

The authorities are all agreed that in the case of a deceased witness his testimony upon similar issues between the same parties is admissible, the test seeming to be whether the party against whom such testimony is offered had, at the former hearing, an opportunity to cross-examine upon the subject-matter in relation to which his testimony is sought to be proved. Greenleaf (1 Greenleaf, Evidence, sec. 163) and many other text-writers state that the rule is the same where the witness is out of the jurisdiction. The cases, however, are in conflict. The following cases are directly in favor of the admission of the evidence: *Magill v. Kauffman*, 4 S. & R. [Pa.], 317; *Howard v. Patrick*, 38 Mich., 795; *Sneed v. State*, 47 Ark., 180; *Lowe v. State*, 86 Ala., 47; *People v. Devine*, 46 Cal., 46.

The other side of the case is not without considerable support. *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev., 174, is a well-reasoned case, holding that such testimony is not admissible, chiefly upon the ground that as a matter of policy any rule admitting testimony partaking of the nature of hearsay should not be extended further than necessity requires; but in that case the court gives other reasons sufficient in themselves to justify the exclusion of the evidence there offered. *Berney v. Mitchell*, 34 N. J. Law, 337, is also a case containing a careful discussion of the question, and practically the same conclusion is reached as by the Nevada court.

In *Wilder v. City of St. Paul*, 12 Minn., 116, such evidence was excluded, not because it was in its nature inadmissible, but because it should not be received until the party offering it has shown that he could not with due diligence have procured the attendance of the witness in person. In that case the showing was that the witness had departed from the state during the trial.

In *Hobson v. Doe*, 2 Blackf. [Ind.], 308, frequently cited in favor of excluding such evidence, the following is the whole report of the case: "A party is not permitted to prove what one of his witnesses swore to on a former trial of the cause until he has proved that the witness is dead." Such a report is of no value as a precedent, as it recites none of the facts, and the statement made does not even purport to be an opinion of the court.

Most of the cases excluding such evidence cite the case of *Wilbur v. Selden*, 6 Cow. [N. Y.], 162. But that case is also authority for holding that in no case can a witness' former testimony be admitted unless the witness by whom it is sought to make the proof is able to state the exact words of the absent witness. Such a rule would practically exclude such testimony in all cases. It was, indeed, once the doctrine of the English courts, but has since been everywhere overruled. Only two authorities are cited. Of these, *Lightner v. Wike*, 4 S. & R. [Pa.], 203, is not at all in point. It simply holds that the witness in that case had not shown himself competent to relate the testimony of the absent witness, and the New York court in citing that case was apparently oblivious of the fact that in *Magill v. Kauffman*, *supra*, in the same volume, the same eminent Chief Justice Tilghman had distinctly held that such testimony was admissible. The other case cited by the New York court is *Le Baron v. Crombie*, 14 Mass., 234, where the point decided was that the testimony of a witness upon a former trial could not be admitted where he had meantime become incompetent by a conviction of an

infamous crime, and even upon that point a careful and discriminating editor has added the note: "This decision is supported by no authority and is inconsistent with general principles."

In *Crary v. Sprague*, 12 Wend. [N. Y.], 41, the evidence upon a former trial had been produced by the defendant. Upon the second trial the plaintiff sought to prove that testimony, but the witness had such an interest in the event of the cause on the side of the plaintiff that under the law then in force he was incompetent.

In *Brogy v. Commonwealth*, 10 Gratt. [Va.], 722, the court recognized the admissibility of such evidence in a civil case, but it held it inadmissible in a criminal proceeding when offered by the defendant, upon the authority of *Finn v. Commonwealth*, 5 Rand. [Va.], 701, apparently overlooking the fact that the distinction between criminal and civil cases enforced in Finn's case grows out of the constitutional guaranty that a person accused of crime shall be confronted by the witnesses and that such distinction should not, therefore, be drawn where the testimony was offered by the defendant.

*Collins v. Commonwealth*, 12 Bush [Ky.], 271, was similar to the Virginia case. It recognized the admissibility of the evidence in civil cases, but held that it was not admissible in criminal.

In *Bergen v. People*, 17 Ill., 426, the evidence of an absent witness was excluded, the court citing a number of criminal cases, and also the New York, Massachusetts, and Indiana cases above referred to. No reference is made in the opinion to any distinction between civil and criminal cases. The evidence was offered by the state, and it was shown that the witness was beyond the jurisdiction by the procurement of the defendant. This case is out of line with all the authorities, for it seems elsewhere always conceded that whatever the rule may be under other circumstances, if the absence of the witness is due to the procurement of

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the party against whom it is offered, his former testimony is admissible.

Upon a careful consideration we are convinced that the rule stated in *Omaha v. Jensen, supra*, is in accordance with the weight and the reason of the authorities. Only two of the cases cited as opposing the rule are entitled to weight. The others are based either upon distinctions not here presented, or are based upon untenable grounds.

The testimony sought to be introduced in this case appears in the bill of exceptions. It is unquestionably material and its exclusion was prejudicial. There are other assignments of error, but as the questions to which they relate are of such a character that they will probably not recur, it will be unnecessary to consider them.

REVERSED AND REMANDED.

RAGAN, C., dissenting.

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EXETER NATIONAL BANK, APPELLANT, v. WILLIAM  
J. ORCHARD ET AL., APPELLEES.

FILED FEBRUARY 20, 1894. No. 5805.

1. USURY: MORTGAGE FORECLOSURE: NOTES: CONSIDERATION.

W. & Co., a private bank, lent money to O. upon an agreement for the payment of usury. The business was conducted between O. and W., one of the partners in the firm of W. & Co. A note was made to the order of W., and a conveyance of land, absolute in form, made to W. to secure the loan. The note was renewed at frequent intervals, usurious interest being paid upon each renewal. Some months after the loan was made the E. National Bank was incorporated and succeeded to the business and assets of W. & Co., W. becoming its cashier. The note continued to be renewed to the order of W. for some years, but finally was renewed to the order of the E. National Bank. O., at the inception of the transaction, did not know that the money lent to him was that of W. & Co., and there was no evidence to show that

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at any particular time he learned of that fact or of the fact that renewal notes belonged to the national bank until the first note was made directly to that bank. *Held*, That in an action by the national bank to foreclose the mortgage, O. was entitled to have all the payments of interest applied as payments upon the principal, and that as these payments, at the time when the first note was made directly to the bank, amounted to more than the original debt, those notes were without consideration and the bank, not being a *bona fide* holder, could not recover.

2. **National Banks: USURY.** It seems that the remedies given by the federal statutes for usury exacted by national banks are exclusive; but that principle does not prevent a debtor, under the circumstances stated in the foregoing paragraph, from availing himself of any defenses to which he is entitled under the state law, and which accrued before he was aware that the debt was owing to the bank.
3. **Usury: RENEWALS OF LOAN: DEFENSE.** Where a loan is originally usurious, the defense of usury applies to all renewals, and when action is brought upon any note, no matter how remote, the court will apply all payments of interest upon such usurious loan as payments *pro tanto* of the principal.
4. ———: ———: **STATUTE OF LIMITATIONS.** Such application is made not by way of set-off or counter-claim, but by way of payment, and the statute of limitations does not bar such a defense.
5. ———: **JUDGMENT UNDER FEDERAL STATUTES: PAYMENTS OF USURY: APPLICATION UPON PRINCIPAL: ESTOPPEL.** After the notes came to be made directly to the bank, O. brought suit against the bank and recovered judgment under the federal statutes for payments of usury made after the bank became the ostensible creditor. *Held*, That that action did not estop O. from pleading usury in the earlier transactions with W. and having those payments applied as payments upon the principal.
6. **Estoppel.** Nor was the making of renewal notes directly to the bank and the payment of interest thereon such a recognition of the existence of an indebtedness as would estop O. from pleading the prior usury and payment by reason thereof.

APPEAL from the district court of Fillmore county.  
Tried below before HASTINGS, J.

*Charles H. Sloan*, for appellant.

*Sedgwick & Power*, contra.

IRVINE, C.

The plaintiff, a national bank, instituted this action for the purpose of foreclosing an instrument which was in form of an absolute conveyance from Orchard and wife to William H. Wallace, dated October 10, 1883, and followed by a quitclaim deed from Wallace and wife to plaintiff, dated September 21, 1887. The petition contained proper averments to constitute this a mortgage, which it was alleged was given to secure the payment of a note made by Orchard to plaintiff for \$500, and dated April 16, 1891. The defense pleaded was usury, and that the full amount of the principal had been paid. The pleadings aver many facts with great particularity, but there is little conflict in the evidence, and the nature of the case can best be stated by a narrative of the facts without regard to whether they are disclosed by the pleadings or evidence. In October, 1883, William H. Wallace and another were engaged in the banking business at Exeter under the name of Wallace & Co. On the day named Orchard borrowed \$400 and gave his note therefor to Wallace, Orchard and wife executing the deed to secure the same. The money advanced is shown to have been that of Wallace & Co., but Orchard avers and testifies that he did not know that fact; that all his transactions were with Wallace, and that he believed Wallace to be the principal. This note was renewed from time to time; sometimes for thirty days; sometimes for sixty; once or oftener for ninety days, the renewal notes always being made to Wallace until April 10, 1889. In February, 1885, the plaintiff bank was organized and succeeded to the business and assets of Wallace & Co. April 10, 1889, upon the maturity of one of the Orchard notes, a renewal note was made to the plaintiff, and from that time on the notes were drawn to plaintiff's order. Neither the deed to Wallace, nor the quitclaim deed from Wallace to the bank, was recorded until March 12, 1892, the day this suit was

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begun. November 30, 1891, Orchard began suit against the bank to recover the penalty under the federal statutes for usury exacted by the bank on several loans. In his petition he sought to recover, among other things, for payment of usurious interest made upon this loan from June, 1889, to the time he brought his action. It seems from the pleadings and from parol testimony that he did recover judgment thereon, but the judgment itself was not offered in evidence. Orchard testifies that when the \$400 loan was first made, in October, 1883, the agreement was that he should pay thereon interest at the rate of two and one-fourth per cent per month; that he paid this interest for fifteen months, when another \$100 was lent to him and a note made for \$500, under an agreement whereby he was to pay upon that sum interest at the rate of two per cent per month. This interest he continued to pay for three years, when an agreement was made reducing the rate of interest to one and one-half per cent per month. This he paid until the first note was drawn to the order of the bank, in April, 1889. According to this testimony he must have paid upon notes drawn to the order of Wallace something over \$600; so that the entire debt was discharged before the first note was made to the bank, provided Orchard's testimony is to be believed and unless some reason is shown for not applying the payments of interest made by him in discharge of the note. The trial court found for the defendants.

Much of the argument on behalf of appellant is taken up with the propositions that although a national bank has no right to lend upon real estate security, nevertheless, when it is organized to succeed a private bank, it has the right to take that bank's securities as it finds them, and enforce them against the borrowers, and further, that, as against a national bank, the remedies given for usury by the federal statutes are exclusive; that, therefore, as to usurious interest contracted for but not paid, the bank simply forfeits the

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interest, and that as to usurious payments of interest an action may be maintained to recover back double the amount paid; but it must be a separate action for that purpose, and payments already made cannot be pleaded as payments upon the principal in a suit by the bank to collect the principal. In the view we take of the case all this may be assumed as true, and yet the judgment of the trial court was correct. It will be remembered that, according to Orchard's testimony, before any note had been made to the bank, enough had been paid by way of interest to discharge the debt. There is a special finding that for a considerable time before the notes were first made to the bank Orchard was aware that they, in fact, belonged to the bank and not to Wallace. There is no finding, however, as to the time when that fact was brought to Orchard's notice. Wallace was the cashier of the bank. The finding seems to be based upon evidence that Orchard frequently paid the interest by checks drawn to bearer or to the order of the bank, and that the business was all transacted in the banking house, sometimes with other officers of the bank than Wallace himself. The matured notes upon their renewal were stamped paid with the bank's stamp, but it is shown that this stamp was used to receipt payment of instruments held for collection only. The notes bore numbers by which the bank designated its own paper, but Orchard did not know the meaning of these numbers. It is questionable whether this evidence was sufficient to sustain the court's finding as to Orchard's knowledge of the ownership of the notes. It is certainly insufficient to enable us to supply a fact not found by the court—the time when Orchard learned of the bank's ownership. If this point is material, the burden of proof would be upon the bank, and it certainly has not satisfied the burden. In reviewing the case we cannot find that at any particular time before the first note was drawn to the bank's order, Orchard knew that Wallace was merely the agent of the bank. Certainly,

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until that fact became known to Orchard, he had a right to treat Wallace as the principal. Suppose, by reason of the transaction, any liability had arisen in favor of Orchard. Upon the most familiar principles Orchard might have maintained his action against Wallace, and even after the discovery of the principal he might elect either to sue the principal or the agent. Probably, on ascertaining the facts, he might have elected to treat the bank as the principal and recover from it the penalty under the federal statutes, but he was not required to so elect. Wallace and the bank had voluntarily given the transaction the form of a loan by Wallace individually, and having given it that form the bank could not be heard to say that, as against any right which Orchard might have, the real transaction was different in its nature. This certainly must be true as long as Orchard remained ignorant of the facts. Down to the time, then, when Orchard contracted directly with the bank he was entitled to all the rights which he would have had had the loan been in fact, as it was in form, a loan by Wallace. The bank, upon its organization, and in all subsequent transactions, must be presumed to have known the facts. (*Colby v. Parker*, 34 Neb., 510, and prior cases there cited.) There was no effort made to show the contrary, and it is clear that no effort to do so could have been successful. The bank, therefore, took the first note made directly to it subject to all equities. The indebtedness which it represented had been fully discharged and the note was without consideration.

The plaintiff in reply pleads that certain of the payments alleged in the answer were made more than four years prior to the commencement of the action, and that the defendant is barred by the statute of limitations from setting them up. This plea is not sound. The payments are not pleaded by way of counter-claim or set-off, but by way of payment and discharge. Where a loan is originally usurious, the defense of usury applies to all renewals thereof and

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all subsequent securities, and when action is brought upon any, no matter how remote, it is subject to the plea and proof of usury, and when the proof is sufficient, the court will apply all payments of interest upon such usurious loan as payments *pro tanto* of the principal. (*Nelson v. Hurford*, 11 Neb., 465; *Knox v. Williams*, 24 Neb., 630; *Blackwell v. Wright*, 27 Neb., 269.)

The suit brought by Orchard to recover the penalty for usurious payments made subsequently to April, 1889, is pleaded as estopping the defendants from maintaining their present defense. This suit undoubtedly recognized the bank as the lender during the period of the payments for which Orchard sought to recover the penalty, and would probably estop him from pleading that the bank is not now, or has not during that period been, the owner of the notes. But Orchard did not in that action seek to recover the penalty for any period earlier than the time when he first made his note directly to the bank, and that action does not estop him from setting up any matters which he might, in an appropriate action, have set up before the period to which that suit relates. There might be some plausible reason advanced for holding, not that the suit for the penalty was a recognition of the validity of the note upon which the payments were made, but that the giving of the renewal notes to the bank, and the payments of interest thereon, were a recognition of the existence of the debt at the time these transactions began. But in usury cases no such consequences follow. The usury laws are founded upon public policy. A man may deliberately contract to pay usurious interest, may make payments as interest, giving on each occasion a new note for the full amount of the principal, and yet, under the authorities we have cited, when he is sued for the principal, the court will treat all the payments made as credits upon the principal, in spite of his deliberate contract to the contrary. Indeed, in most cases, in order to establish a defense of usury the defendant must plead and

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prove that he was a party to the unlawful contract. The general principles of estoppel, for reasons of public policy and for other reasons growing out of the nature of the transactions, do not apply to usury cases.

It is, as usual, asserted that the findings of the trial court are not supported by the evidence. We have stated the purport of Orchard's testimony. It is true he does not produce checks, receipts, or books of account. He does not give with exactness dates of payments, but he avers, and it appears, that Wallace or the plaintiff kept account of the transactions. The plaintiff produces nothing to contradict Orchard's evidence. Wallace himself was upon the stand, and the only evidence in the record tending in any way to contradict Orchard comes from Wallace, and is as follows:

Q. Do you remember the rate of interest which the bank charged on this loan at any time?

A. Yes, sir.

Q. State whether or not at any time it amounted to two and one-half per cent or two and one-fourth per cent.

A. No.

It will be remembered that Orchard's testimony was that two and one-fourth per cent was only charged for a period of fifteen months after the loan was first made, and that this was during a period when everything except Wallace's testimony indicates that it was Wallace himself and not either Wallace & Co. or the bank which charged that rate. This testimony in no wise contradicts Orchard. It is less ingenuous, but discloses no greater regard for the law than Wallace's testimony at another point, where he says that because it was against the law for a national bank to loan on real estate he had made a good many loans in the way this was made, so that in case there was any trouble he could take them up. The record discloses no error, and the judgment of the trial court was as much in accordance with good law as it was with good morals.

JUDGMENT AFFIRMED.

**WALTON E. BURLINGIM, APPELLANT, v. CHARLES E. WARNER ET AL., IMPLEADED WITH NORMAN A. KUHN ET AL., APPELLEES, AND BRENNAN & BAGLEY ET AL., APPELLANTS.**

FILED FEBRUARY 20, 1894. No. 5245.

1. **Review: FINDINGS OF TRIAL COURT.** In cases tried to the court without a jury the finding on questions of fact is entitled to the same weight and the same presumption of correctness as a verdict of a jury. The rule is the same whether the case is brought to this court on error or appeal, and applies to all classes of actions.
2. **Mechanics' Liens: VENDOR AND VENDEE.** Where the owner of land completes negotiations for the sale thereof and the vendee takes possession without the consent of the owner and commences the erection of a building, but fails to make the payment of the purchase money, which by the terms of the sale was to be made upon the delivery of the conveyance, and the vendor refuses to make a conveyance or complete the contract without such payment, no agreement in writing having been executed, the vendor is not charged with liens for labor and material used in constructing the building.
3. ———: ———: **ESTOPPEL.** The vendor, in such a case, when he learned that the building was in progress, warned those engaged in its erection that they were trespassers and that the person with whom they had contracted had no rights in the property, but subsequently visited the premises and complained of the manner in which some of the work was being performed. The circumstances did not justify an inference that the mechanics had relied upon his later acts or undertaken or continued their work on the faith thereof. *Held*, That he was not thereby estopped from asserting his title as against the mechanics' liens.
4. **Mortgages: CANCELLATION OF RELEASE: MECHANICS' LIENS.** A loan and trust company had contracted to lend the vendee money secured by mortgage upon the premises. The mortgage had been delivered and by the trust company recorded, but no money advanced. The agreement was that the money should not be advanced until the vendee procured title and had expended a certain sum in constructing the buildings, and that the vendee should furnish the trust company a bond conditioned

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that the buildings should cost a stipulated sum. The vendor refused to convey because of the vendee's failure to pay the purchase money, and the vendee did not furnish to the trust company such a bond as its agreement required. The trust company then executed releases of its mortgage. *Held*, That persons claiming liens growing out of the construction of the buildings had no equity by which they could require a conveyance to be made, the releases of the mortgage canceled and the money advanced thereon and applied to the payment of their claims.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*Winfield S. Strawn and Charles H. Breck*, for appellants.

*Isaac E. Congdon and George F. Gilmore*, contra.

IRVINE, C.

Walter E. Burlingim began this suit to foreclose a mechanic's lien upon certain lots in the city of Omaha. Charles E. Warner, Egbert E. French, Norman A. Kuhn, the Central Loan & Trust Company, and a number of other parties were made defendants. The defendants not named claim mechanics' liens upon the property.

The plaintiff in his petition alleged a contract between the defendants Goddard and Seivert and the defendant Warner to erect for Warner two brick dwellings upon the lots in controversy, and the purchase by Goddard and Seivert from the plaintiff of materials which were delivered and used for the purpose of erecting such buildings; that Warner was then the owner of the property "by some contract of purchase from Norman A. Kuhn, in whom was the fee title," and that under said contract Warner had entered into possession of the premises; that under the contract Warner was required to erect the buildings upon the lots; that plaintiff furnished the material and filed a claim of lien as required by law; that while the contract for the erection of the buildings and purchase

of the lots was made with Warner, yet Warner was insolvent and was acting in the whole matter for the defendant French ; that Kuhn took from French and Warner a bond conditioned to relieve such realty from mechanics' liens, and to secure the erection of such buildings clear and free of such liens. The petition further avers that the defendant the Central Loan & Trust Company had two certain mortgages from Warner and wife upon said lots in the sum of \$7,500, duly recorded, but that no part of the sum secured by said mortgages had ever been paid, but the whole was yet in the hands of the trust company, which company the plaintiff avers has always been ready to pay over the same upon the execution and delivery by Kuhn of a deed to Warner, but that Kuhn refuses unlawfully to deliver such deed. The prayer is for the establishment of the mechanic's lien prior to any claims of Kuhn, Warner, and French ; that Kuhn be decreed to deliver a deed to the property, and that the trust company be required to bring the proceeds of the loan into court, and out of that the plaintiff's lien paid, and in any event the property be sold to satisfy the same. There were other prayers incident to the above which need not be specifically stated.

Some of the defendants claiming liens filed cross-petitions in substance similar to the original petition. Other defendants filed cross-petitions alleging, in terms, that Warner acted in the premises as agent for Kuhn. Still others averred ownership generally in Warner without averring any facts which could possibly charge any interest which Kuhn might have with their liens. These differences in the pleadings become unimportant in the view we take of the case.

Warner, by his answer, denied everything except his contract with Goddard and Seivert, and that he was in possession of the property under a contract of purchase from Kuhn.

Kuhn, by answer, averred that he agreed with Warner

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upon the terms of a sale, and that the proposed contract was put in writing; that the purchase price of the property was to be \$5,000, \$1,200 of which was to be paid in cash, but that the contract was never executed; that Warner never paid any of the purchase price; that Kuhn never gave Warner the right to enter into possession, never authorized the construction of improvements upon the property, and expressly told plaintiff while he was delivering material that Warner had no right or interest in the premises.

To this answer the plaintiff replied, denying each material affirmative allegation, and averring that when plaintiff found the title to be in Kuhn he applied to Kuhn and was by Kuhn informed that the premises had been sold to Warner and that French was taken as surety on the contract for the sale of the land and building of the houses, and that Kuhn would consider the sale by Burlingim a good sale, and that thereupon the plaintiff delivered the material; that Kuhn was present at the buildings, gave instructions in regard to the contract, and assumed a superintendency thereof.

The Central Loan & Trust Company answered that it had two mortgages "on file" upon the property and that no part of the sum described by said mortgages had been paid, but denied that it had ever been ready to pay over the same, and averred that it was one of the express conditions of the contract of loan that no money was to be paid until Warner had acquired title in fee-simple to the premises, and had fully constructed the buildings; that Warner had not finished the buildings and had not acquired title to the premises, and that the trust company had declared its agreement at an end and entered of record releases of the mortgages.

The different pleadings, based upon the original petition and the cross-petitions, are numerous and voluminous, but their nature is fairly summarized by saying that they re-

sulted in forming issues upon all the claims substantially similar to those above stated.

A trial was had and a decree rendered finding that neither the plaintiff nor any defendant had any claim or lien upon the interest of Kuhn; that the different mechanic's lien claimants had liens in amounts specified upon such interest as Warner might have in the premises; that Kuhn did not enter into any contract by virtue of which Warner was under obligation to or had a right to erect any building upon the premises, but that the verbal negotiations for such contract were never completed by the performance of the conditions precedent upon which Kuhn was to enter into such contract, and that no written contract had ever been executed. The court declined to adjudicate the question of Warner's equitable rights.

The plaintiff and the defendants claiming mechanics' liens appeal from the decree, claiming that the evidence brings the case within the rule stated in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719.

On behalf of the appellants the argument is based chiefly upon the state of affairs which the testimony on their behalf tended to establish, and it is urged that the testimony on behalf of Kuhn should not prevail against the contradicting evidence. It is said that upon appeal the case should be tried *de novo*, and that the findings of the trial court are a nullity in an equity case brought here upon appeal. It would seem that this question is so well settled that it should not be again raised. In cases tried to the court without a jury the finding on questions of fact is entitled to the same weight and the same presumptions of correctness as would be accredited to the verdict of a jury. (*Cheney v. Eberhardt*, 8 Neb., 423; *Hartley v. Dorr*, 15 Neb., 451; *McLaughlin v. Sandusky*, 17 Neb., 110; *Roggencamp v. Seeley*, 19 Neb., 170; *Cass County Bank v. Morrison*, 17 Neb., 341; *Bond v. Dolby*, 17 Neb., 491.) A large number of cases might be cited. In this respect the rule is the same

upon appeal as in proceedings in error. (*Newman v. Mueller*, 16 Neb., 523; *Armstrong v. Freeman*, 9 Neb., 11.) Indeed, many of the cases cited were appeals.

The appellants urge a reason, which is at least unique, for departing from the established rule in this case. It is as follows: "If it is urged that any presumptions of correctness attach to the decision of the court below, we cannot only urge that the trial here is *de novo*, but remind this court—and do it in the utmost courtesy to the lower court—that upon the most important principles in mechanic's lien cases, and in almost everything that goes to sustain the law, or to make it what it was intended to be, *remedial*, in short, to give it any efficacy whatever, this court has had to reverse the district court, and do it in no uncertain terms, nor to any limited extent. In justice to these mechanics who earn their living in this way, and to whom, therefore, the legislative power has given this additional remedy for the enforcement of their claims for payment of their labor and material," etc. We should think mechanics and material-men should be satisfied with the privileges granted them by the terms of the mechanics' lien law and the liberal construction this court has always placed upon it, and not seek to arrogate to themselves, because the legislature has granted them so many favors, the benefits of a course of procedure not granted to any other class of litigants, and contrary to principles firmly established in the jurisprudence of the state. The findings of the trial court must, therefore, prevail as to questions of fact, if they have for their support such evidence as would sustain the verdict of a jury, or the findings of a court in a case not relating to mechanics' liens. The search, therefore, must be for evidence which will sustain the findings of the trial court, and not for evidence which might have sustained contrary findings. When so examined, the testimony of Kuhn tends to show that in the winter of 1889 and 1890 he and Warner had

negotiations looking towards the sale of the lots to Warner. Kuhn proposed to sell for \$5,000, \$1,500 to be paid in cash and the deferred payments to be secured by mortgage. Later, Kuhn agreed to accept \$1,200 in cash, and finally agreed that if Warner would build two houses upon the lots of a character agreed upon, Kuhn would accept as security for the deferred payment a mortgage which would be subject to two mortgages, each for \$3,500, which would be made for the purpose of procuring money for building. In addition to this a satisfactory bond was to be furnished and given to Kuhn. Contracts embodying the agreement were drawn up but never signed by either party. Warner never paid the \$1,200, or any part thereof; on the contrary, he sought, at a later period, to induce Kuhn to accept notes secured by second mortgage on other property in lieu of cash, and that failing, he endeavored to have Kuhn accept the \$1,200 out of the loan which was to have been made by the Central Loan & Trust Company, and which the contracts contemplated should be used in constructing the buildings. The latter course Kuhn finally agreed to, but when they went to the agent of the trust company they were met with a refusal to complete the loan because Warner did not tender to the trust company a satisfactory bond. Other reasons were assigned by the trust company; but upon this branch of the case the only important fact is that the trust company did refuse to complete the loan; Kuhn did not receive the \$1,200, or any part thereof, and neither contract nor deed was ever delivered. In the meantime, the evidence tends to show Warner had taken possession of the property and begun the construction of the houses. When Kuhn ascertained this, he notified the people at work thereon that they were trespassers, and that Warner had acquired no rights. Kuhn is corroborated in very many particulars, and the trial court was justified in believing him. There is nothing showing any such part performance as would take the case out of the statute of

frauds. According to the testimony on behalf of appellees, Kuhn did not put Warner in possession. Warner simply took possession, and Kuhn persistently denied and controverted his rights, insisting at all times that the payment of \$1,200 should be made before any conveyances should be delivered.

There is evidence tending to show that when Kuhn informed the mechanics that they were trespassers, work was stopped, and the following morning Goddard and Seivert came to Kuhn's place of business inquiring if Warner had been there. Before they left, Warner entered. Warner and Kuhn had a conversation which it seems neither Goddard nor Seivert heard. In this conversation Kuhn swears that he told Warner that he would not permit the men to go to work until Warner paid the money, signed the contract, and "got the whole thing in shape." After this it appears that Warner told Goddard and Seivert it was "all right" and directed them to proceed, but there is evidence that Kuhn did not hear that statement. Accepting this evidence as establishing the facts, it is clear that not only was there no privity between Kuhn and the contractors, but there was none between Kuhn and Warner, and that Kuhn was no more responsible than he would be for the acts of a total stranger trespassing upon his property. Goddard and Seivert proceeded with the work, and it is undisputed that Kuhn several times thereafter visited the premises and was aware the work was in progress. The number of times he was present and his acts while at the premises are matters upon which the evidence is conflicting. It is certain, however, that he, on two occasions at least, after the work had progressed to a very considerable extent, made complaint as to the manner in which some of the work had been done and asked that the defects be remedied, explaining that he expected to have a second mortgage on the property and was therefore interested in having the building properly constructed. Kuhn says this state-

ment was made because he was still being led to believe that Warner would eventually perform his bargain. All this, it must be remembered, was after Kuhn had informed the contractors that they were trespassers and that Warner had no rights in the premises. It was after they had undertaken the work and after they had expended a great deal of labor thereon. It is plain that they could not have entered into their contracts with Warner relying upon Kuhn's acts; that they did not begin the work or begin to furnish material in reliance thereon; and there is nothing whatever to show that they continued the work after Kuhn's visits, relying upon his conduct. On the contrary, the inference rather is that they resented his conduct as an officious interference on his part. Were it shown that he by his language or conduct had led them to make the contract, to begin the work, or even to continue beyond a point where they would otherwise have ceased, an entirely different question would be presented. But under the facts as they appear, it cannot be claimed that Kuhn was estopped from setting up his title as against the mechanics' lienors.

So far we have discussed the case solely with reference to the relations between Kuhn and the mechanics' lienors. As against the Central Loan & Trust Company, the lienors claim that the contract for a loan was completed; that the trust company accepted the mortgages and placed them upon record, and is bound, irrespective of other facts, to furnish the money thereon, which should equitably be applied to the discharge of the liens. The applications for the loans are dated the "—— day of April, 1890." They said, among other things: "Title is in the name of Charles E. Warner." "Describe the buildings fully. Nine rooms, two-story and basement brick residences, size 25 by 40 feet, have slate roof, gas, city water, bath, furnace, mantel. Frame barn, size 14 by 16 feet, 12-foot posts." "When were they built? April, 1890." "In what repair at present? Good repair." The title was not in Warner, the

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buildings were not then completed, nor had they approached completion. If we are confined to the written contract, these were material misrepresentations which would relieve the trust company from the obligation of advancing the money and entitled it to cancel the contracts. If we can go outside of the writing, there is evidence that there was a verbal agreement that the money should not be advanced until Warner had title, and not then until a certain amount had been expended upon the buildings, and that Warner agreed to furnish a bond conditioned, among other things, that the houses should cost not less than \$4,500. As already seen, Warner did not procure title, and there is evidence tending to show that while he tendered a bond it was not one in conformity to the agreement. The loan company was under no obligations then to advance the money and was justified in executing releases of the mortgages and annulling its contract. We have discussed the question solely in view of the evidence tending to sustain the findings of the trial court. There was a great deal of testimony of a different nature. Whether if such other testimony had been believed by the trial court, and whether if the negotiations between Kuhn and Warner had been perfected and reached the status of an enforceable contract a different decree would have been required, are questions not before us for determination.

There was ample evidence to sustain the findings of the trial court. Upon a consideration of that evidence it requires no argument to show that the lienors have no equity either as against Kuhn or the trust company.

**JUDGMENT AFFIRMED.**

JOHN L. CARSON, ADMINISTRATOR, ET AL. V. JOHN H.  
DUNDAS, ADMINISTRATOR.

FILED FEBRUARY 20, 1894. No. 5302.

1. **Ejectment: PLEADING: POSSESSION.** In an action of ejectment an answer denying plaintiff's title, averring title in the answering defendant, and alleging that defendant's title had been divested by legal proceedings and a judicial sale, and that the purchaser had been put in possession and defendant ousted, amounts to a disclaimer of title and a denial of possession.
2. ———: **ADVERSE POSSESSION: PURCHASER AT JUDICIAL SALE.** Where, in an action of ejectment, title has been adjudicated in the plaintiff, but the defendant in possession decreed to have a lien upon the land and the land ordered sold to satisfy it, the purchaser at a sale under such decree cannot, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had.
3. ———: **PURCHASER AT JUDICIAL SALE: LIENS.** The purchaser at such a sale takes the title of the plaintiff in the action, in whom title was decreed, freed, however, from the lien to satisfy which the sale was made.
4. **Effect of Tax Sales.** A sale to satisfy tax liens, when the action was brought *in personam* and not against the land itself, passes only the title of the parties to the action and their privies in estate. It does not divest the title of strangers.
5. **Ejectment: ADMINISTRATORS.** An administrator may, during the period of administration, maintain ejectment against the grantees of his decedent's heirs. His possessory interest under chapter 23, section 202, Compiled Statutes, is sufficient to sustain such action.
6. ———: **EVIDENCE.** When both plaintiff and defendant claim title from a common source, evidence of the derivation of title antecedent to that common source is immaterial.
7. ———: **PROOF OF PLAINTIFF'S TITLE.** The plaintiff in ejectment need not prove title as against the whole world. It is sufficient if he prove a title good as against the defendant.

ERROR from the district court of Nemaha county. Tried below before APPELGET, J.

*George W. Covell and Robert W. Patrick, for plaintiffs in error.*

*E. W. Thomas and W. H. Kelligar, contra.*

IRVINE, C.

Dundas brought this action in ejectment to recover the northwest quarter and the northeast quarter of section 4, township 4, range 14, in Nemaha county. The original defendants were John L. Carson, administrator of the estate of Matthew A. Handley, deceased, McFarland Campbell, and Albert Gillen. In his petition Dundas alleged that Peter B. Borst died intestate in the state of Virginia, April 24, 1882, and that he, Dundas, had been appointed administrator of Borst's estate by the county court of Nemaha county, and had qualified as such, and he claimed the land described as such administrator. Afterwards the heirs of Handley, upon their own motion, were made parties defendant. The cause was removed to the United States circuit court, and subsequently remanded to the district court for Nemaha county. After it was remanded the district court sustained a demurrer to the petition, which went to the jurisdiction of the court and the capacity of the plaintiff to maintain the action. A judgment of dismissal was entered and the case brought to this court, where the judgment of the district court was reversed, this court holding (*Dundas v. Carson*, 27 Neb., 634) that an administrator may maintain ejectment for the recovery of real property for the necessary purposes of administration. That rule thus became the law of the case. After the case was remanded, the administrator and heirs of Handley filed an answer denying plaintiff's title, averring title in themselves by adverse possession, and further averring that

since the commencement of the action all of the premises in controversy had been sold under a decree of the United States circuit court to Henry Harmon, the sale confirmed, a deed made, and the answering defendants evicted by the marshal under an order of the court.

At this point the case may be briefly disposed of so far as it concerns Handley's administrator and heirs who are among the plaintiffs in error. Their answer amounted to a disclaimer of title. It was, in substance, a denial of plaintiff's title and an averment of title in themselves by adverse possession, and then an averment that that title had been divested by judicial sale and vested in Harmon thereby; in other words, they pleaded that they no longer had title and that they were no longer in possession, and this removed all issues in the case except those based upon plaintiff's count for rents and profits. Upon these issues there was no finding or judgment against Handley's heirs or administrator. They have nothing whatever to complain of here.

Immediately after the cause was remanded Henry Harmon and John N. H. Patrick applied to be made parties defendant, and their application being sustained, filed separate answers.

Harmon, after specific denials, amounting, in effect, to a general denial of the allegations of the petition, averred title by adverse possession in himself of the northwest quarter. Then he averred conveyances of all the land in controversy from the widow and heirs of Peter Borst to John W. Borst, one of those heirs. The widow was also Borst's administratrix in Virginia, the place of his domicile. Harmon's answer then alleged that in 1885 John W. Borst brought an action in ejectment in the circuit court of the United States against Handley's administrator and heirs to recover said land; that all the defendants answered, and that it was in that action determined that John W. Borst was entitled to possession, and that the defend-

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ants had a lien upon the land for \$2,700, for taxes paid, and because of the ownership of a judgment which was a lien upon the land, and that if said lien should not be paid within twenty days the land was ordered sold to satisfy it; that John W. Borst did not pay the lien; that the land was sold under order of the court to Harmon, the sale confirmed, and a deed made and delivered to Harmon, who was put in possession on January 18, 1888.

The answer of Patrick was similar to that of Harmon, except that it averred a conveyance of the northeast quarter by Harmon to Patrick, and asserted title in Patrick to that quarter.

A jury was waived and the cause tried to the court, which found title to be in the estate of Peter B. Borst, subject to the amount of the judgment of the United States circuit court. It subrogated Harmon and Patrick to the lien of Handley's estate, and ordered possession to be given to Borst's administrator, upon the condition precedent, however, that he should first pay to Harmon on account of the northwest quarter one-half of the lien decreed by the federal court, together with interest, and less "the rents and profits of said land for four years, amounting to \$894; and to Patrick, one-half of said lien, with interest, less the rents and profits of the northeast quarter for four years, amounting to \$620." Both Harmon and Patrick prosecute error.

Both Harmon and Patrick claim title under the proceedings in the federal court, which was proved substantially as alleged in their answer. They have no other paper title. The action in the federal court was by John W. Borst, who had the title of Peter Borst's widow and heirs. The administrator and heirs of Handley were all parties to that action and were bound by the decree. The decree in that case awarded possession to John W. Borst, and, in effect, though not in express terms, found the title to be in him as against Handley's estate. The sale made under the decree, in pursuance of that portion of it establishing a lien in

favor of the Handley estate, vested in Harmon, and subsequently by his conveyance of a portion of the land to Patrick, in the latter, all the title and interest of the parties to the federal case, and no more; that is, it vested in Harmon and Patrick the title of Peter Borst's heirs and the interest of Handley's heirs and administrator; but Borst's administrator was not a party to that action, and such interest as he may have had in the land was not bound by that decree nor divested by that sale.

Harmon and Patrick pleaded adverse possession and endeavored to tack to their own possession, subsequent to the judicial sale, the possession of Handley and his heirs prior thereto. They cannot so unite these possessions. Their title is derived through the judicial sale in pursuance of the decree of the federal court. That decree adjudicated title in Borst's heirs, or in their grantee, and against Handley's representatives and heirs. What they took was the Borst title so adjudicated, with the Handley lien discharged and satisfied by the sale. Claiming under those proceedings, they cannot be heard to say that they claim under the Handley title. They claim no conveyances from the Handleys, and there is no privity between them and the Handleys.

It is contended that the Handley lien being for the most part for taxes, it was superior to all other liens or claims, and that a sale therefor passed the absolute title to the land regardless of the parties to the action. This is not true. The proceedings were not *in rem*, but *in personam*. The decree bound the parties to the action and their privies, but no others, and the sale and deed thereunder vested in the purchasers only such estate as John W. Borst had (Code of Civil Procedure, secs. 499, 500), with the additional features that the decree had, as against Borst, conclusively terminated the Handley claim, and the sale satisfied the Handley lien. Regarded as a proceeding by the Handleys to foreclose a tax lien, the sale only vested in the pur-

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chasers the title of the adverse party to the action, the proceeding being against the owner and not against the land itself. (Comp. Stats., ch. 77, art. 5, sec. 6.)

The case, then, resolves itself to this: Harmon and Patrick are the privies in estate of John W. Borst, and are entitled to the benefit of the adjudication of title in favor of Borst against the Handleys. But such rights as Peter Borst's administrator had against his heirs have not been adjudicated, and the case, by the proceedings subsequent to the former judgment of this court therein, became substantially an action in ejectment by Peter Borst's administrator against the representatives of his heirs. It is true that Peter Borst's administratrix, appointed in the state of his domicile, was a party to the action in the federal court, but such rights as the personal representative had in the land were possessed by the administrator appointed by the courts of this state and not by one appointed in the state of the decedent's domicile. It is not probable that that proposition would be controverted, and no argument is required for its support.

We are thus brought to the consideration of a single question: May an administrator maintain ejectment against the heirs of the decedent in possession? The former opinion in this case, 27 Neb., 634, decides that an administrator may maintain ejectment against strangers. Compiled Statutes, chapter 23, section 202, provide: "The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents, issues, and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the probate court, to the heirs or devisees, and shall keep in good, tenantable repair, all houses, buildings, and fences thereon which are under his control." There is no special procedure provided for an administrator's enforcing the right so given. The supreme court of California, construing a statute substantially similar to our own,

has held, in a case cited by Judge COBB in the former opinion in this case, that during administration an administrator may recover possession from the grantee of the heirs in an action of ejectment. The case is in all material aspects in point and we are entirely satisfied with the reasoning and conclusions of that court, which are as follows:

“It is contended on the part of the appellant that plaintiff, as administratrix, is entitled to the possession of the premises of the deceased during and for the purposes of administration. On the other hand, the respondents insist that the defendants, claiming under the devisee in the will, are entitled to the possession; that before the administratrix can recover, she must allege and show that the possession is required by her for the purposes of administration, viz., to pay debts, etc.

“We are of opinion that the court below erred in granting the new trial. During the administration, and until distribution, partial or final, the executor or administrator is entitled to have the possession of the property left by the deceased. The statute authorizes an heir to recover possession as against third persons, but not as against the executor or administrator. The district court, in an action of ejectment, could not try and determine whether there will be debts to be paid, or expenses of administration, or past sickness, or funeral charges. The consideration of those matters is exclusively within the jurisdiction of the probate court. The executor or administrator cannot be kept out of the property until the probate court shall have settled his accounts, and the debts and expenses have been ascertained, and then, and not till then, have his action to recover possession; but immediately upon the issuance of his letters, he is entitled to have the possession of the estate of deceased, to the end that the rents and profits, and, if need be, the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed, and by him delivered to the parties entitled.

The grant of letters by the probate court is conclusive upon other courts as to the necessity for administration." (*Page v. Tucker*, 54 Cal., 122.)

Errors are assigned upon the admission in evidence of certain records and instruments through which title was traced to Peter Borst. This evidence was all immaterial, and, the trial being without a jury, error cannot be predicated upon its admission. The pleadings, as well as the evidence, show that both sides claimed under Peter Borst, the plaintiff, as his administrator; Harmon and Patrick, through the judicial sale. Claiming title from a common source, it was not necessary for the plaintiff to prove title antecedent to that common source. A party is estopped from denying a title under which he claims to derive his own right to the premises. (*Barton v. Erickson*, 14 Neb., 164; *Gaines v. New Orleans*, 6 Wall. [U. S.], 715; *Merchants Bank of St. Louis v. Harrison*, 39 Mo., 433.) This rule holds good where the defendant traces title through a sheriff's sale. (*Feimster v. McRorie*, 1 Jones' Law [N. Car.], 547.) The rule requiring the plaintiff in ejectment to recover on the strength of his own title does not mean that he must show a good title against all the world. It is sufficient if he shows a right to recover against the defendant. (*Gaines v. New Orleans*, *supra*; *Garrett v. Lyle*, 27 Ala., 589.) The title is shown to be in Harmon and Patrick, subject, however, to the possessory interest of the administrator, which is sufficient to sustain the action.

**JUDGMENT AFFIRMED.**

**EUGENE MOORE, AUDITOR, V. JOSEPH GARNEAU, JR.,  
COMMISSIONER GENERAL, ET AL.**

FILED MARCH 6, 1894. No. 6752.

1. **Vouchers.** The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*State v. Moore*, 36 Neb., 579.)
2. ———. *Held*, That the voucher finally presented to the state auditor in this case for audit and allowance conforms to the above definition, and is in legal form.
3. **World's Columbian Exposition: COMMISSIONER GENERAL: POWER TO MAKE CONTRACTS.** By virtue of chapter 41, Session Laws, 1893, the commissioner general for this state at the World's Columbian Exposition, appointed under and in pursuance of said act, possessed the power or authority to contract for and purchase all property, as well as employ all labor, necessary for the successful presentation of the products, resources, and possibilities of this state at said exposition, and the state, in the absence of a showing of collusion or fraud, is liable to the person performing such labor, or furnishing said property, at the price stipulated therefor in the express contract entered into with the commissioner general.

ERROR from the district court of Lancaster county.  
Tried below before STRODE, J.

*George H. Hastings, Attorney General, and C. A. Atkinson*, for plaintiff in error.

*Frank T. Ransom, contra.*

NORVAL, C. J.

This was an appeal to the district court of Lancaster county from the decision of the auditor of public accounts in rejecting, in part, a claim upon the state treasury in favor of the Henry Dibblee Company. Upon the trial the district court reversed the decision of the auditor, and en-

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tered a finding in favor of the claimant for the sum of \$3,280, and directed the auditor to issue a warrant upon the treasury for said sum in payment of said claim of the Henry Dibblee Company. The auditor has brought the cause into this court for review by petition in error.

The record before us discloses that Joseph Garneau, Jr., the commissioner general for this state at the Columbian Exposition, entered into a contract with the Henry Dibblee Company of Chicago, whereby the latter agreed to furnish certain furniture, fixtures, and decorations required for the Nebraska state building and the exhibits of this state in the various exposition buildings, for the stipulated sum of \$4,000. In pursuance of said contract all of said furniture, fixtures and decorations were furnished and delivered. Subsequently, under other contracts with the commissioner general, the Henry Dibblee Company furnished and delivered on the exposition grounds for the use of the state in making its exhibits certain other furniture and property for the stipulated price of \$2,856. The aggregate of the several purchases is \$6,856, on which there has been paid \$3,628, and no more. The claim for the balance of the account was filed with the auditor, who allowed thereon \$872, and rejected the remainder of the claim. A warrant was drawn for said last named sum, which the claimant declined to accept, but prosecuted an appeal to the district court.

The answer filed by the auditor in the district court alleges, in substance:

First—That all the goods and furniture described in the petition, and for which voucher was presented to the auditor, were not purchased of the Henry Dibblee Company.

Second—That the voucher filed with the auditor was not in proper form.

Third—That the prices agreed upon by and between the claimant and the commissioner general “are extravagant, unjust, illegal, and unwarranted, and greatly in excess of the value of the goods, furniture, and property.”

Upon the trial in the court below the auditor did not offer any proof to establish the first defense interposed. On the contrary, the evidence introduced by the other side conclusively established that each and every item specified in the claim presented to the auditor was actually furnished and delivered by the claimant to Mr. Garneau on the exposition grounds, and was used by the latter in furnishing and decorating the Nebraska state building and in arranging and making the display of the several exhibits of this state at the fair. The property and decorations so furnished were necessary for the proper carrying into effect the act of the legislature. Nothing further under this branch of the case need be said.

As to the form of the voucher submitted for audit and allowance, we do not understand that the auditor now seriously urges any objection. As first filed in the auditor's office the voucher was not in proper shape, in that there was no itemization of the articles furnished and the prices charged for each article. The following is a copy of the account:

"THE STATE OF NEBRASKA,

"To HENRY DIBBLEE Co., Dr.

"To itemized account and receipted bill hereto attached for merchandise furnished as therein stated:

To item for educational exhibit (A).....	\$1,978
To item for state building, including painting of all the walls and wood work (B).....	4,000
Item of extras for furniture for dairy, forestry, edu- cational, and agricultural exhibits, and extra fur- niture for state building (C).....	878
	<hr/>
	\$6,856
Less cash paid.....	3,628
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	\$3,228

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"To be charged to appropriation for Nebraska exhibit at World's Columbian Exposition, approved April 8, 1893.

"I hereby approve and allow the above claim in the sum of \$3,228, and certify the same to be in all things just and correct, and that it is due the party named herein, and is wholly unpaid.

JOS. GARNEAU, JR.,

*"Commissioner General Nebraska Exhibit, World's Columbian Exposition."*

For the \$1,978 and \$4,000 charges no list of the goods furnished making up the same with the prices charged accompanied the voucher, hence the auditor would not have been justified in allowing the claim as first presented. In *State v. Moore*, 36 Neb., 579, this court held that an original voucher, when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*People v. Swigert*, 107 Ill., 495.) Subsequently, at the request of the auditor, the claimant brought itself within the above decision, for a detailed itemized bill was furnished the auditor, which was attached to the original voucher presented for allowance. The voucher, with the exhibits thereto attached, when finally acted upon, was sufficient.

There was evidence before the trial court, given by credible witnesses, which fully justified the contention of the auditor, that many of the prices charged by the claimant greatly exceeded the fair and reasonable market value of the goods and property furnished, and that under ordinary circumstances they ought to, and could, have been purchased at a sum which would have resulted in a saving to the state of several hundred dollars. There is also evidence which tends to show that goods of the character and class furnished the commissioner general by the claimant, as well as most other kinds of goods, were held and sold in Chicago during the exposition at extravagant prices.

Mr. Garneau in his testimony states, with reference to the purchase of the property, that he submitted plans and specifications for estimates and bids to five persons in Chicago and two in Omaha; that the Omaha firms stated they could not offer a bid, from the fact they could not do so on the details without sending a man to Chicago to look it up; that three of the Chicago parties absolutely declined to bid, stating that they had more work than they could get done; that bids were received from two firms, that of the Henry Dibblee Company being \$80 lower; that he purchased the property described in the voucher at the lowest possible figure for which the goods could be procured at the time the same were bought; and that the bill as rendered the state was the contract price agreed upon between the witness and the claimant. Upon the conflicting testimony the trial court decided against the state. As already stated, all the articles charged in the voucher were furnished under express contracts, the prices being at the time agreed upon. There is no charge of fraud or collusion between Mr. Garneau and the claimant in the transaction, nor is there a particle of evidence in the record upon which such a charge could be predicated. Mr. Garneau was the representative or agent of the state, and as such, by virtue of the act under which he was appointed, possessed the power or authority to purchase the goods in question, as well as appoint assistants and employ such clerical and other help deemed necessary for the presentation of the work. The state, in the absence of fraud, is bound by the contracts under which the property was furnished. It is an elementary rule that a principal is bound by the acts and contracts of his agent within the scope of the agent's authority; and we do not know of any reason why the same rule should not apply to the state as well as an individual. Had no prices been agreed upon, then the state would have been liable for the fair market value of the goods, and no more. The decision of the district court is

**AFFIRMED.**

## PATRICK S. REAL V. PETER HONEY.

FILED MARCH 6, 1894. No. 5201.

39	516
139	776
139	778
39	516
43	333
39	516
44	11
144	564
39	516
47	800

1. **Names of Parties: AMENDMENT OF PLEADINGS.** Where a plaintiff to an action is designated in the pleading and process by the initials of his Christian name, it is not error for the court to allow him to amend by inserting his full Christian name.
2. **Dismissal: NAMES: PLEADING: AMENDMENT.** An action should not be dismissed because the plaintiff's full first name is omitted from the title of the cause, until an opportunity has been given the party to correct the defect by amendment.
3. **Bill of Exceptions: AUTHORITY OF JUSTICE OF PEACE TO SIGN: APPEAL: REVIEW.** The statute confers no authority upon a justice of the peace to sign a bill of exceptions in an action tried before him without a jury, nor can the evidence adduced in such a case be reviewed in the district court on petition in error, for the purpose of determining whether it is sufficient to sustain the judgment.
4. **Taxation of Costs: REVIEW: MOTION.** In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court.

**ERROR** from the district court of Fillmore county. Tried below before MORRIS, J.

The facts are stated in the opinion.

*Charles H. Sloan*, for plaintiff in error:

The motion of defendant to dismiss the case for want of a proper party plaintiff was properly overruled by the justice. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 246.)

The taxation of costs is not a judicial action, in the proper sense of the term, but is ministerial; and without a motion to retax, which would call into action the judicial power, the taxation cannot be reviewed upon error. (*Ross v. Harper*, 99 Mass., 175; *Barnes v. Smith*, 104 Mass.,

363; *Abbott v. Matthews*, 26 Mich., 176; *Stricker v. Holtz*, 50 Ia., 291; *Woods v. Colfax County*, 10 Neb., 556; *Cosine v. Hatch*, 17 Neb., 606; *Whittall v. Cressman*, 18 Neb., 511; *Wilkinson v. Carter*, 22 Neb., 189; *Jacobs v. Morrow*, 21 Neb., 239; *Linton v. Housh*, 4 Kan., 541; *Hoagland v. Van Etten*, 31 Neb., 292.)

*E. E. Hairgrove and Ong & Jensen, contra.*

NORVAL, C. J.

This was an action brought by the plaintiff in error in the name of P. S. Real against the defendant in error before a justice of the peace, claiming in his bill of particulars a judgment for \$15. On the return day of the summons, by consent of parties, the trial was postponed until a subsequent date, it, at the time, being agreed that the defendant should not thereby waive any right which he might have to object to the jurisdiction of the court. On the day to which the action was adjourned, the defendant filed a motion objecting to the jurisdiction of the justice, for the reason "that there is no proper plaintiff to said cause, in that said Real, alleged plaintiff herein, has not commenced this action in his proper name as provided by section 23 of the Code of Civil Procedure," and praying that the suit be dismissed. The motion was denied, and thereupon plaintiff asked permission to amend the title of the cause by inserting his Christian name in full, which request was granted by the justice, and the title was accordingly amended to read "Patrick S. Real v. Peter Honey." The defendant then filed a bill of particulars denying that he was indebted to the plaintiff in any sum, and pleading a set-off in the sum of \$32.50, for which amount he prayed judgment against the plaintiff. A trial was had to the justice, a jury being waived, who found that there was due the plaintiff from the defendant the sum of \$2.50, and that there was due the defendant on his set-

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Real v. Honey.

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off a like sum of \$2.50. A judgment of dismissal was entered, and one-half the costs were taxed to each party.

The defendant prosecuted error to the district court, alleging in his petition the following grounds for reversal of the judgment:

1. The overruling of the motion to dismiss for want of proper party plaintiff.

2. In finding that the defendant was indebted to the plaintiff in the sum of \$2.50.

3. In taxing one-half of the costs to the defendant.

Upon the hearing the district court sustained each of the assignments of error, reversed the judgment, and ordered that the case be retained in that court for trial. Plaintiff in error excepted, and brings the case here on error.

The first question is, whether the justice erred in refusing to dismiss the case because the plaintiff sued by the initial letters of his Christian name. We think not. Ordinarily, the full Christian names of the parties to a suit must be given. An exception to the rule is where the action is brought upon a promissory note or other written instrument, and the party thereto is designated by the initials or some contraction of his Christian name. In which case, under section 23 of the Code of Civil Procedure, it is sufficient to use the initials or contraction of the Christian or first name of the party. But this is not an action upon a written instrument, therefore plaintiff's first name should have been given in full in the summons and the papers in the case. This defect, however, was cured by the justice permitting an amendment to be made by inserting the full Christian name of the plaintiff.

Section 144 of the Code provides that "the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name, or a mistake in any other respect, or by inserting other allega-

tions material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." Under the foregoing section the justice had ample power to allow the amendment in question. The statute authorizes a pleading, process, or proceeding to be amended at any time by correcting a mistake in the name of a party.

In *Martin v. Coppock*, 4 Neb., 173, the summons was issued in the name of Isaac Coppock and served upon Martin. Afterwards the summons was amended by changing the name "Isaac" to "Isaiah," to conform to the pleading. It was held that the amendment related back to the time of service of the writ.

In *Reed v. Beardsley*, 6 Neb., 493, the action was brought against the members of a partnership, and on the trial it was discovered that the transaction was with one member of the firm in his individual capacity. The court allowed the filing of an amended petition, changing the title of the action. On error to this court the ruling was sustained.

*Haskins v. Citizens Bank*, 12 Neb., 39, was an action brought by a partnership before a justice of the peace. There was a variance in the title between the summons and bill of particulars. It was held that the justice was authorized to allow the bill of particulars to be amended so as to conform to the summons.

It is plain that every court has the power to permit any pleading, process, or proceeding to be amended, whenever justice will be thereby promoted; and in every case, before a court makes an order dismissing an action because the full Christian name of the plaintiff has not been written in the pleading or process, opportunity should first be given the party to correct the omission by amendment. As the defect in the case at bar was cured by amendment immediately upon the objection being made, the justice did not err in overruling the defendant's motion to dismiss.

Whether the justice erred in finding that the defendant

was indebted to the plaintiff in the sum of \$2.50 could only be determined upon an examination of the evidence upon which the finding was based, and there is no bill of exceptions preserving the testimony. Besides, it is well settled in this state that a justice of the peace has no power to settle a bill of exceptions in a case tried before him without a jury. Therefore, in the case at bar, had the evidence been incorporated in a bill of exceptions, neither this court, nor the court below, could have reviewed the same for the purpose of ascertaining whether it supported the finding and judgment of the justice. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and cases there cited.) It will be presumed that there was ample testimony before the justice to sustain the judgment. Error is never presumed, but must appear affirmatively from an inspection of the record.

Lastly, it is claimed that the taxing of a portion of the costs against the defendant was error. Whether this is true or not we are unable to determine, since no motion to retax the costs was made before the justice. It has been often decided that before a judgment for costs will be reviewed by an appellate court, a motion to retax must be made in the trial court and a ruling obtained thereon by that court. (*Cozine v. Hatch*, 17 Neb., 694; *Whitall v. Cressman*, 18 Neb., 508; *Wilkinson v. Carter*, 22 Neb., 186.)

There being no reversible error in the proceedings in the justice court, the judgment of the district court is therefore reversed, and that of the justice of the peace is affirmed.

REVERSED.

## JAMES BARRY V. PATRICK BARRY.

39	521
139	509

FILED MARCH 6, 1894. No. 5328.

1. **Appeal from County Court: FAILURE TO FILE TRANSCRIPT: DISMISSAL.** In case an appeal is taken from the county court to the district court, except in matters of probate jurisdiction, the appellant must file, or cause to be filed, with the clerk of the district court of the proper county a transcript of the proceedings on or before the thirtieth day after the rendition of the judgment, and in case such transcript is not so filed within the thirty days, the district court, upon motion of the appellee, may dismiss the appeal and remand the cause to the county court, to be there proceeded in as if no appeal had been taken.
2. **Review: AFFIDAVITS: MOTIONS: BILL OF EXCEPTIONS.** Affidavits used on the hearing of a motion in the district court, to be available in this court, must be incorporated in a bill of exceptions.

**ERROR** from the district court of Dakota county. Tried below before NORRIS, J.

*Jay & Beck*, for plaintiff in error.

*John T. Spencer*, contra.

NORVAL, C. J.

On the 9th day of December, 1891, defendant in error obtained a judgment in the county court of Dakota county against plaintiff in error for the sum of \$193.18, with costs. On the 14th day of December, plaintiff in error filed with said court an appeal undertaking, and the same was duly approved. On the 12th day of January following, a transcript of the proceedings was filed in the district court. The defendant in error filed in said court a motion to dismiss the appeal on the ground that the transcript was not filed within thirty days after the rendition of the judgment. The court sustained the motion, dismissed the ap-

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Barry v. Barry.

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peal, and remanded the cause to the county court for proceedings therein as though no appeal had been taken. This ruling is before us for review.

This court has more than once held that in order to perfect an appeal taken from the judgment of a justice, the appellant must file a transcript of the proceedings in the office of the clerk of the district court of the proper county within thirty days after the rendition of the judgment, and in case the same is not so filed, the district court is authorized, on motion of the appellee, to dismiss the appeal and remand the cause to the justice court, to be there proceeded with as if no appeal had been taken. (*Slaven v. Hellman*, 24 Neb., 646; *Converse Cattle Co. v. Campbell*, 25 Neb., 37; *Lincoln Brick & Tile Works v. Hall*, 27 Neb., 874.)

Section 26, chapter 20, Compiled Statutes, relating to appeals from county courts, provides that "either party may appeal from the judgment of the probate [county] court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace," etc. Under the foregoing provision an appeal from a judgment of the county court must be taken and perfected in the same time as allowed by law for appeals from judgments of justice courts; that is to say, the appeal undertaking must be filed within ten days after judgment is entered and the transcript of the proceedings must be delivered to the clerk of the district court on or before the thirtieth day after the rendition of the judgment. In this case the appeal was not perfected in time, since plaintiff in error did not file his transcript in the district court until the thirty-fourth day. (*Maggard v. Van Duyn*, 36 Neb., 862.)

Plaintiff in error contends that the affidavit of Mell C. Jay, copied into the transcript prepared for this court, contains sufficient facts to excuse the failure to file the transcript in the statutory period. The affidavit referred to cannot be considered by us, for the reason that the same

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Chicago, R. I. & P. R. Co. v. Shepherd.

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is not made a part of the record of the case by a bill of exceptions. We have no means of knowing whether the affidavit was called to the attention of the district court on the hearing of the motion, or whether any evidence was produced on such hearing. Often this court has decided that affidavits used in support of a motion in the trial court will not be considered in the reviewing court, unless the same are embodied in a bill of exceptions. This rule cannot be departed from. (*Tessier v. Crowley*, 16 Neb., 369; *Bradshaw v. State*, 17 Neb., 147; *Graves v. Scoville*, 17 Neb., 593; *Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Maggard v. Van Duyn*, *supra*; *Aldrich v. Bruss*, 39 Neb., 569.)

The district court did not err in dismissing the appeal, and the decision is

AFFIRMED.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY  
v. J. N. SHEPHERD.

FILED MARCH 6, 1894. No. 5194.

39	523
39	528
39	593
140	57
39	523
42	134

1. **Vendor and Vendee: EASEMENT: RIGHT OF GRANTEE TO DAMAGES.** A grantee of land which is incumbered by a right of way or other easement takes it burdened with such incumbrance, and will not, as a rule, be entitled to recover damage therefor.
2. **Trespass: PLEADING.** In order to maintain an action for trespass to land it must appear either that the plaintiff was the owner of the premises or in possession thereof at the time of the commission of the acts charged.
3. **Pleading: MOTION FOR SPECIFIC STATEMENT.** The office of a motion for a more specific statement is not to cure fatal defects in pleadings, but to secure definite statements in pleadings which are sufficient in substance but not in form.
4. **The failure to allege a material fact raises a presumption that it does not exist.**

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Chicago, R. I. & P. R. Co. v. Shepherd.

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ERROR from the district court of Pawnee county. Tried below before APPELGET, J.

*M. A. Low and W. F. Evans*, for plaintiff in error.

*D. D. Davis and Daniel F. Osgood*, contra.

Post, J.

This was an action in the district court of Pawnee county against the Chicago, Kansas & Nebraska Railway Company to recover for damage to lots 10, 11, and 12 in block 8, in Hazel's addition to Pawnee City. Afterwards an amended petition was filed against said defendant and the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company.

Plaintiff, in his amended petition, states that during the year 1886 the Chicago, Kansas & Nebraska Railway Company built and constructed a railroad in Pawnee City, and in the building, operation, and construction of said railroad a large portion of Third street is occupied and used; that blocks 10, 11, and 12, in said city, are owned by the said company, and that said railroad is constructed upon the same; that said railway company has built, constructed, and operated its railroad and stock yards upon, over, and across said block 11; that Walnut street in said city extends north and south along the east side of blocks 8 and 11, and in the building and construction of its railroad said company threw up and built a large embankment, entirely obstructing said street at a point about 200 feet south of the southeast corner of lot 12 in said block. It is further alleged "that the plaintiff is the owner in fee-simple of lots Nos. 10, 11, and 12 in said block 8, his dwelling house being situated on the south end of lot 12 in said block, which he occupies for his residence," and that ever since the construction of said railroad and stock yards said yards have been used almost continuously day and

night, and have been occupied by large numbers of cattle and hogs, and have been permitted to become noisome, unclean, and unhealthy, and have given out a strong and unhealthy stench, contaminating the air and rendering his said residence almost uninhabitable by reason thereof, and that "by reason of the bellowing of the cattle and the noise of the hogs inclosed in said yards during the night the rest of this plaintiff and his family is disturbed, as is the peace and comfort of his home by the same noises during the day, as well as by the shouts and noise of the loading and unloading of said stock into defendant's cars," and that "by reason of the smoke and soot from the defendant's engines, the noise of the bell and whistle, and of the passing of defendant's cars on said railroad at all hours of the day and night said premises have been made unfit for residence purposes; also, by reason of the closing of said Walnut street, as aforesaid, traffic has been entirely cut off from said street and diverted therefrom. By reason of which the plaintiff has suffered pecuniary loss, and his said property has been diminished in value, and he has been otherwise injured, to his great damage, in the sum of \$500." It is further alleged that the Chicago, Rock Island & Pacific Railway Company claims to have purchased and become the owner of said railroad and claims to be operating the same.

The Chicago, Kansas & Nebraska Railway Company was not notified of said action, and did not enter its appearance therein.

The answer of the Chicago, Rock Island & Pacific Railway Company, in addition to a general denial, contains an allegation that the railroad referred to in the amended petition was constructed by the Chicago, Kansas & Nebraska Railroad Company, a corporation of the state of Nebraska, and that afterwards said railroad company sold and conveyed the same to the Chicago, Kansas & Nebraska Railway Company, a corporation of Kansas and Nebraska, and

that during all of the times mentioned in plaintiff's amended petition the railroad and stock yards were in possession of, and were being operated by, the St. Joseph & Iowa Railroad Company, under a lease executed by the Chicago, Kansas & Nebraska Railway Company. It also alleges the adoption of an ordinance by the city, which is set out at length, and which authorizes the use of the streets described in the petition by the Chicago, Kansas & Nebraska Railroad Company, its successors and assigns.

On the trial of the action in the district court, a verdict was returned for the plaintiff below, upon which judgment was rendered. The plaintiff in error, after moving unsuccessfully for a new trial, has removed the case into this court by petition in error.

The plaintiff below was permitted, over the objection of the defendant therein, to prove that the lots in controversy were worth \$1,000 immediately prior to the construction of the said road, and that immediately after the completion of the tracks and the stock yards they did not exceed \$500 in value. The ground of the objection to this evidence is that the right of action, where land is taken or permanently injured in the construction of railroads, or by other agencies of the state, is personal and does not run with the land.

From an inspection of the petition it will be observed that it is not alleged therein that the plaintiff owned the lots described when the road was constructed in 1886. The only allegation is that "he is [at the date of the filing the petition, in March, 1890] the owner of said lots and occupies them as a residence." A grantee of land which is subject to a right of way or other easement takes it burdened with such incumbrance, and is not, as a rule, entitled to recover damage therefor. (*Wadhams v. Lackawanna & B. R. Co.*, 42 Pa. St., 303; *Beale v. Pennsylvania R. Co.*, 86 Pa. St., 509; *Davis v. Titusville & O. C. R. Co.*, 6 Atl. Rep. [Pa.], 736; *Chicago & A. R. Co. v. Maher*, 91 Ill., 312;

*Chicago & E. I. R. Co. v. Loeb*, 118 Ill., 203; *Piper v. Union P. R. Co.*, 14 Kan., 568; *Dunlap v. Toledo, A. A. & G. T. R. Co.*, 50 Mich., 470; *Milwaukee N. R. Co. v. Strange*, 63 Wis., 178; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind., 409.)

It is conceded that had the Chicago, Kansas & Nebraska Railroad Company been a trespasser in the first instance, and continued to occupy the streets without authority from the city, a different question might have been presented; but the use of the street by the railroad company for its tracks was fully authorized by the ordinance, hence the right of action for injury to the property described accrued to the owner when the road was constructed, in the year 1886. A recognized rule of pleading is that the complaint in an action for trespass must allege that the plaintiff was the owner or in possession when the trespass was committed. (*Winkler v. Meister*, 40 Ill., 349; *Edwards v. Noyes*, 65 N. Y., 125; 2 Boone, Pleading, p. 442.) Counsel who appear for the defendant in error in this court frankly admit that the petition would have been held insufficient had it been assailed by a motion for a more specific statement. Where a pleading is sufficient in substance but wanting in form, the remedy is by motion (*Farrar v. Triplett*, 7 Neb., 237); but where the petition lacks an essential allegation, without which it fails to state a cause of action, objection on that ground may be raised by demurrer, or by motion for new trial. Another rule is that where the pleader has failed to state a material fact, the presumption is that it does not exist. (*Burlington & M. R. R. Co. v. York County*, 7 Neb., 487; *McClure v. Warner*, 16 Neb., 447.)

Our conclusion is that under the allegations of the petition the plaintiff was not entitled to recover damages for the appropriation of the street by the defendant company for its tracks, and that the submission of that question to the jury, over the objection of the defendant, was error. There are other errors assigned, but the record of the case

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Chicago, R. I. & P. R. Co. v. Bachman.

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is of so confusing a character as to leave us in doubt as to what questions were submitted. We are therefore unable to say whether the rulings complained of, if erroneous, are prejudicial to the plaintiff in error. For reasons above stated the judgment will be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY  
v. JOSEPH BACHMAN.

FILED MARCH 6, 1894. No. 5193.

ERROR from the district court of Pawnee county. Tried below before APPELGET, J.

*M. A. Low* and *W. F. Evans*, for plaintiff in error.

*D. D. Davis* and *Daniel F. Osgood*, contra.

POST, J.

The issues and essential facts of this case are identical with the case of *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523, decided at this session, and for reasons stated therein the judgment of the district court is

REVERSED.

## RUPERT W. BRADY V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 6646.

**Witnesses: ATTORNEY AND CLIENT: CONFIDENTIAL COMMUNICATIONS.** An attorney will not be permitted to disclose confidential communications made to him by a client while the relation of attorney and client continues; but communications voluntarily made to him after the confidential relation has terminated may be proved, although they are the same in substance as given while the relation existed.

**ERROR** to the district court for Lancaster county. Tried below before TIBBETS, J.

*Stearns & Strode*, for plaintiff in error:

A communication is not privileged unless the person to whom it is made is acting for the time being in the character of a legal adviser of the person who makes it. The communication must also be made for the purpose of obtaining professional advice or aid in the matter to which the communication relates. (*Alderman v. People*, 4 Mich., 414; *Milan v. State*, 24 Ark., 346; *Beeson v. Beeson*, 9 Pa., 279; *Flack v. Neill*, 26 Tex., 273; *Allen v. Harrison*, 30 Vt., 219.)

Communications which an attorney is precluded from disclosing, the client cannot be compelled to disclose. (Wharton, Cr. Ev., sec. 583; *Hemenway v. Smith*, 28 Vt., 701; *Bigler v. Reyher*, 43 Ind., 112.)

*George H. Hastings*, Attorney General, for the state:

Communications to which privilege once attaches are always privileged, whether made with reference to the existing action, or to a previous one if the same question is in dispute. (*In re Cowdery*, 69 Cal., 32; *Sleeper v. Abbott*, 60 N. H., 162; *Bank of Utica v. Mersereau*, 3 Barb. Ch. [N.

Y.], 592; *Foster v. Hall*, 12 Pick. [Mass.], 89; *People v. Atkinson*, 40 Cal., 284; *Bacon v. Frisbie*, 80 N. Y., 394.)

Whenever the communication made relates to a matter so connected with the employment of attorney as to afford presumption that it was the ground of making the same by the client, then it is privileged. (*Turquand v. Knight*, 2 M. & W. [Eng.], 98.)

Post, J.

This is a petition in error to review a judgment of the district court of Lancaster county whereby the plaintiff in error was convicted of the crime of burglary. He is charged in the information with feloniously breaking and entering a stable, the property of Charles O. Davis, with intent to steal six chickens of the value of \$3. The only direct evidence of the guilt of the accused is the testimony of Charles Smith, an alleged accomplice, who had been convicted of the same offense and was at the time serving a term in the penitentiary. Said witness having testified that the accused was present and participated in the burglary, it was sought to impeach him by showing that he had previously made statements fully exonerating the accused from complicity in the crime charged. For that purpose the following affidavit was offered in evidence, its execution having been admitted by said witness:

"STATE OF NEBRASKA, }  
LANCASTER COUNTY. }

"Charles Smith, being duly sworn, on oath says he is one of the defendants in the above entitled case; that his co-defendant, Rupert W. Brady, was occupying a room in the house affiant was stopping at at the time of the alleged burglary and larceny for which affiant and his said co-defendant were tried at the May, 1893, term of the district court, but that at the time affiant and his said co-defendant, Rupert W. Brady, had no business relations at all. Affiant further says that said Rupert W. Brady had no con-

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Brady v. State.

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nection with the alleged burglary and larceny of Chas. O. Davis' hen house on the night of March 31, 1893, wherein it is charged that the barn and stable of said Chas. O. Davis was forcibly broken into and entered and six Plymouth Rock chickens stolen, taken, and carried away; that said breaking and entering, whatever was done on that night in the way of entering into the structure that said Chas. O. Davis' chickens were in, and the taking of said chickens was done by affiant alone without the assistance or advice or the knowledge, so far as affiant knows, of said Rupert W. Brady; and affiant says said Rupert W. Brady had no financial interest in, or benefit from, said burglary and larceny upon the premises of said Charles O. Davis on said night of March 31, 1893, and that whatever has heretofore been said by affiant in any way implicating said Rupert W. Brady in said burglary and larceny was done at a time when there was a misunderstanding and ill-feeling between this affiant and said Rupert W. Brady, and said charges were made by this affiant to get revenge, and for mere spite work, upon the part of this affiant, and was wholly without foundation in fact, and this affiant is now ready to make amends, as far as affiant now can, for the wrong done an innocent person.

“CHARLES SMITH.

“Subscribed in my presence and sworn to before me, this 29th day of June, A. D. 1893. R. D. STEARNS,

“*Notary Public.*”

The above affidavit was excluded on the objection of the state, as was also a verbal admission to the same effect made to Mr. Stearns, attorney for the accused. The ground upon which this evidence was excluded is that the admissions offered were made at a time when the relation of attorney and client existed between Mr. Stearns and the witness Smith, and are therefore privileged communications. The only evidence which it is claimed sustains that conclusion is the testimony of Mr. Stearns, from which it appears

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Brady v. State.

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that at a former term the plaintiff in error and Smith were tried together for the same offense, which resulted in a verdict of guilty as to both defendants, but which was subsequently set aside on their motion. At that trial Smith was represented by Mr. Oppenheimer and the plaintiff in error by Mr. Sirode, who was assisted by Mr. Stearns. Smith soon afterward withdrew his plea of not guilty and entered a plea of guilty. After judgment on his plea of guilty he sent for Mr. Stearns, to whom he volunteered the statement that the plaintiff in error had nothing to do with the burglary, and offered to make an affidavit to that effect. The affidavit set out above was then prepared by Mr. Stearns and signed and sworn to by said witness after it had been read over in his presence and fully explained to him. We may assume that the relation of Mr. Stearns to the defense of Smith was such as to impress the information received from the latter during the trial with the character of a privileged communication. There is, however, no evidence that the relation of client and attorney existed between them at the time the affidavit was made. On the other hand, it appears that the prosecution had terminated in the conviction of the party whose statements were offered in evidence. By section 328 of the Code an attorney is declared incompetent to testify concerning any communication made to him by a client; and by section 333 it is provided that no practicing attorney, in giving testimony, shall disclose any confidential communication properly intrusted to him in his professional capacity. These provisions, it seems, are but declaratory, and add nothing to the general rule. It is not necessary to the application of the rule that any judicial proceeding should have been commenced or even contemplated. It is sufficient if the matter in hand may become the subject of judicial inquiry. (1 Greenleaf, Evidence, 240.) But all authorities recognize one essential to a privileged communication, viz., the attorney, solicitor, or counsel must have been acting for the

time being in the capacity of a legal adviser. (1 Greenleaf, Evidence, 239, 244; Taylor, Evidence, 930; *Romberg v. Hughes*, 18 Neb., 579.) The fact that the same or similar statements may have been made to the attorney while the confidential relation existed is immaterial, provided such statements are voluntarily repeated after the termination of such relation. It is said in *Yordon v. Hess*, 13 Johns. [N. Y.], 492, that "while an attorney cannot disclose what has been communicated to him in that capacity, if the client chose after that relation has ceased to volunteer any communication, he is not protected, although they may be in substance the same as given while the relation existed." It follows that in excluding the evidence offered the district court erred. This conclusion renders an examination of other questions presented unnecessary. The judgment of the district court is

REVERSED.

39	533
44	147

OTTO COURCAMP ET AL. V. GEORGE P. WEBER.

FILED MARCH 6, 1894. No. 5500.

1. **Alteration of Instruments: EVIDENCE: NOTES: JUDGMENTS.** Where a note was introduced in evidence which disclosed upon its face that it had been altered from a note to bear interest at "10" per cent per annum from "maturity" to one to draw "7" per cent per annum from date, the number "10" and word "maturity" in the original having been crossed out by a line or lines drawn over each with pen and ink, and the number "7" and word "date" interlined or written above the number and word crossed out, *held*, that it was error to render judgment or grant decree upon such note, as testimony of the amount due, without some evidence explaining such alteration.
2. ———: **TIME OF ALTERATION: EVIDENCE.** When an altered note has been received in evidence either with or without testimony explanatory of such change, it then becomes the province

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Courcamp v. Weber.

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of the court or jury, if tried by jury, to decide from the evidence, as a question of fact, whether such alteration was made before or after the execution of the note, and it is error for the trial court to exclude testimony offered which is competent upon such question.

ERROR from the district court of Saunders county. Tried below before BATES, J.

The facts are stated in the opinion.

*Holmes, Cornish & Lamb*, for plaintiffs in error:

An alteration of a promissory note in any material part renders it invalid as against the party not consenting thereto, even in the hands of an innocent purchaser. (*Brown v. Straw*, 6 Neb., 536; *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.)

The alteration of the note was a material alteration. (*Palmer v. Largent*, 5 Neb., 225; *Wait v. Pomeroy*, 20 Mich., 425; *Benedict v. Cowden*, 49 N. Y., 396; *Nazro v. Fuller*, 24 Wend. [N. Y.], 374; *Woodworth v. President and Directors of the Bank of America*, 19 Johns. [N. Y.], 391.)

A material alteration of a written instrument will be presumed to have been done with a fraudulent intent, in the absence of evidence to the contrary. In such cases no action can be maintained on the instrument. (*Walton Plow Co. v. Campbell*, 35 Neb., 173, and cases cited.)

*Clark & Allen, contra:*

The proof offered by the defendants shows that Weber did not make the alteration, and had no knowledge of it until a year after it was made. Having been guilty of no fraud himself, he is not precluded from recovering the debt. (*State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.)

This is not an action upon the note, but to foreclose a mortgage and subject the security to the payment of the debt. A mortgage secures the debt and not the note or

bond or other evidence of it. No change in the form of the evidence, or the mode or time of payment—nothing short of actual payment of the debt, or express release, will operate to discharge the mortgage. The mortgage is not affected by a change of the note. (2 Jones, Mortgages [3d ed.], sec. 924.)

**HARRISON, J.**

September 29, 1891, George P. Weber filed a petition in the district court of Saunders county, alleging the execution and delivery of two notes, each for \$1,000, by the Courcamps and others to one Martin Tighe, and of a mortgage on certain property in Valparaiso, Nebraska, to secure the notes; that the notes were purchased before maturity by Weber (defendant in error) and notes and mortgage duly assigned to him by Tighe. The petition contained the further allegation of default in payment of amount due on the mortgage, etc., and prayed for foreclosure. The answer of the principal defendants pleaded fraudulent alteration of the note in suit, in that it had been changed since executed and delivered, and without the knowledge or consent of defendants, so as to bear interest from date, the note when executed having been made to draw interest from maturity. This answer also contained a general denial of all allegations in the petition. Weber, in reply to this answer, states that the note was in the same condition when purchased by him as it is now, and if any alteration has been made in it, the same was without the knowledge of plaintiff and before he bought it. Tighe, the original payee of the note, filed answer and reply, and in his reply to the answer of the principal defendants states that this note in suit and another which was secured by the same mortgage were given to him by the Courcamps for a portion of the purchase price of the property covered by the mortgage in suit; that the alteration, if any, in the note would conform it in the interest stating portion to the original agree-

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ment regarding interest, and to be as it should have been originally written. There was a trial to the court, finding against defendants, and decree of foreclosure. The case is brought here by the principal defendants for review.

The first question which presents itself in an examination of the case and the proceedings had at the trial thereof is, did the court below err in allowing the note to be introduced in evidence over the objection of defendants?

George P. Weber was called in his own behalf, and as a part of his examination the following appears:

Q. You may look at this note, Exhibit "A," and state who is the owner, if you know?

The defendant Martin Tighe objects to the introduction or any testimony in this case against him, under the petition in this case, for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant Martin Tighe. Objection overruled, and the defendant Martin Tighe excepts.

Plaintiff asks leave to amend petition as follows: "And on the day said note became due it was then presented to Lizzie Courcamp, Otto Courcamp, Jacob Reyher, and Jacob Hoover, and payment thereon demanded, which was refused, and it was thereupon protested for non-payment, of all which said Martin Tighe had due notice." Leave to amend is granted by the court, to which the defendant Martin Tighe excepts.

A. I am.

Q. You may look at this mortgage, Exhibit "B," and state who is the owner of that, if you know?

A. I am.

Plaintiff now offers in evidence Exhibits "A" and "B." Defendants Courcamp, Reyher, and Hofee object, for the reason that the instrument does not purport to be the instrument declared on in the petition. Objection overruled, defendants except, and the same were read to the court and are hereto attached.

The last objection was undoubtedly made to raise the question of the admissibility of the note in its altered condition, without first explaining such alteration, and was, we think, sufficient as an objection to raise the question.

The defense to the action was that a material alteration of the note had been made subsequent to its execution and delivery, without the knowledge and consent of the defendants who signed it. The note was a printed form, with blank spaces for date, amount, name of payee, etc., which were filled in in writing at the time of execution. As printed, it drew interest at "10 per cent" from "maturity," the figures making up the "10" and the word "maturity" being printed. The "10" and the word "maturity" in the note introduced at the time of trial had been erased with ink by drawing the pen across or through them, and just above the "10" was interlined the figure "7," and above the word "maturity" the word "date" was written. The note had a coupon attached, which coupon was for the sum of \$70, or interest at 7 per cent for one year, the time the note was to run, on the amount of the note, \$1,000. The petition and action were founded upon the note as evidence of the debt, and the decree is predicated upon it as evidence of the amount of indebtedness. The description of the debt, as set forth in the mortgage, was as follows: The consideration was stated at "two thousand dollars," and in the condition the sum of "two thousand dollars, \$1,000 dollars on the 13th day of May, 1891; \$1,000 on the 13th day of May, 1893, with interest thereon at 7 per cent per annum, according to the tenor and effect of the two promissory notes of said Otto Courcamp, Jacob Reyher, and Jacob Hofee, bearing even date with these presents." The first note of \$1,000, above described, is the one in suit.

From the foregoing it will be gathered that the note, or some competent evidence, was necessary in the case, other than the mortgage, from which to determine the amount due, as the same was not definitely ascertainable from the

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terms of the mortgage, and, moreover, no other or further testimony was offered of the amount due than the note. Hence, the note became or was a material portion of the plaintiff's testimony, and unless entitled to be admitted in its altered condition, upon objection by defendant should have been excluded, or not admitted without testimony being first introduced explaining such changes. We are satisfied that under the condition of the issues as raised by the pleadings in the case, as between the plaintiff and principal defendants, and the alterations by erasure and interlineation as shown by the face of the note, the objection of defendants to its introduction was well taken and that the court below erred in overruling the same. We are aware that the rule is well settled in this court that the decision of a trial judge, when the trial is to the court, admitting evidence, the objection to the testimony being in reference to its relevancy or competency, will not be considered here; and such a ruling, if erroneous, is not error which will reverse the judgment or decree of the lower court; but where the evidence so admitted is objectionable, being incompetent, and is the testimony upon which the judgment in the case is based, as was the note in this case, and the objection to its introduction might be removed by explanatory evidence, without which it was invalid and no recovery would be allowed upon it, the action of the court in basing its decree thereon will be reviewed, and, if erroneous, will be sufficient to warrant a reversal. This case falls within the rule just stated, since the finding of the amount due plaintiff was from the note alone. The trial court should have required testimony explaining the alteration or alterations in the note before receiving it in evidence. (*Johnson v. First Nat. Bank*, 28 Neb., 792.) We have no doubt that the alteration in the instrument, changing it from a note bearing interest at 10 per cent per annum from maturity to one bearing 7 per cent per annum from date, was a material alteration, and even if the note had been competent

evidence, admissible in its altered condition without any explanatory testimony, or admitted without objection, the defendants were entitled to introduce evidence showing such alteration, and that it was made after the note was executed without their consent or knowledge on their part; but when they offered such evidence, it was excluded. This was error. Such evidence was admissible. (*Walton Plow Co. v. Campbell*, 35 Neb., 173.)

It is contended that the alterations in the note were not made with any fraudulent intent, but honestly and under the supposition that the party making them had a right to do so, and that such alterations were to make it conform with what was originally to be done and not with a view to obtain any undue advantage. If this be true, then, although the validity of the note may have been destroyed, and it would not have been competent evidence of the indebtedness, and no recovery could have been had upon it, this court has mapped out the proper course to be pursued under such circumstances or state of facts in *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1, in which case an altered note was excluded as evidence on the trial and no recovery allowed thereon. It was held: "Where an alteration is made under an honest mistake of right, and not fraudulently and with a view to obtain improper advantage, a recovery may be had upon the original consideration of the note. And it is the duty of the court, upon payment of the costs, to permit the plaintiff to amend his petition, setting up the original consideration."

It follows from the above considerations and conclusions that the decree of the court below must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

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 Roggenkamp v. Hargreaves.
 

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39	540
45	710
45	866
89	540
146	547

**WILLIAM ROGGENKAMP ET AL. V. ALFRED E. HARGREAVES ET AL.**

FILED MARCH 6, 1894. No. 4521.

1. **Partnership.** The evidence in the case examined, and *held* sufficient to sustain the verdict.
2. **Instructions: HARMLESS ERROR.** Objection to an instruction given by the court on its own motion considered, and *held*, when taken in connection with an instruction given at request of defendant, to so present the issues in the case that although such instruction may have been defective and indefinite its giving was not prejudicial to the rights of defendant.
3. **Form of Verdict: JUDGMENT: TRIAL.** Objections to the verdict of the jury in this case considered, and *held*, that the verdict was not so deficient or erroneous, in either form or substance, as to call for a reversal of the case, and that it was proper and correct for the jury in the case, it being one against the individual members of a partnership on an account for articles of merchandise furnished to the firm, to return a verdict against one defendant or member of the firm alone, and that the court did not err in rendering judgment on such verdict.
4. **Verdict: OBJECTIONS: REVIEW.** Objections to the form and terms of a verdict should be made in the court below at the time of rendition, in order to be available on error to this court.
5. **Partnership: ACTION ON ACCOUNT: JUDGMENT AGAINST ONE MEMBER.** In an action against the individual members of a partnership on an account for merchandise purporting to have been furnished to the firm, if the testimony shows that the articles were furnished to one of the persons composing such firm, that the debt sued for was the individual debt of such member or person, a verdict may be returned against such member, and judgment rendered thereon against him alone.

ERROR from the district court of Lancaster county.  
Tried below before CHAPMAN, J.

*Abbott, Selleck & Lane*, for plaintiffs in error.

*Cornish & Tibbets*, contra.

HARRISON, J.

January 12, 1888, the plaintiffs in the court below (defendants in error here) filed a petition in the district court of Lancaster county, in an action against William Roggenkamp and Charles Scott, partners, doing business as Scott & Roggenkamp, as defendants. The petition is short and we will give a copy of it:

“The above-named plaintiffs, a firm doing business at Lincoln, Nebraska, complain of the above-named defendants, a firm doing business at Bennett, Nebraska, for that on the 10th day of August, 1886, plaintiffs sold and delivered to William Roggenkamp certain merchandise, consisting of smoked meats and hams, in the reasonable value of \$33.40, which amount said Roggenkamp agreed to pay; that the same has not been paid, nor any part thereof; that there is now due from defendants to the plaintiffs thereon the sum of \$33.40 and interest.

“Second—Plaintiffs further say that the said merchandise was purchased by the said Scott in the name of William Roggenkamp, and the same was shipped and delivered by plaintiffs to said Roggenkamp.

“Third—Plaintiffs further say that the said Scott, at the time of the said purchase, was in business in Bennett, Nebraska, as partner of the said Roggenkamp and that the said merchandise, as plaintiffs verily believe, was purchased for the use and benefit of said firm, and that said firm is liable for payment of the same.

“Plaintiffs pray judgment for the sum of \$33.40 and interest, and costs of suit.”

To this petition Scott did not answer. Roggenkamp, as answer for himself, filed a general denial. A trial was had to the court and a jury, and the jury rendered a verdict, which was as follows:

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Roggenkamp v. Hargreaves.

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“HARGREAVES BROS., PLAINTIFFS, }  
  v. }  
WILLIAM ROGGENKAMP. }

“We, the jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of their recovery at the sum of thirty-three and  $\frac{40}{100}$  dollars principal, and seven  $\frac{79}{100}$  dollars interest.”

A motion for a new trial was filed, argued, and overruled, and judgment rendered on the verdict against William Roggenkamp, and the case is brought here on error for our consideration.

The first assignment of error argued by plaintiff in error in his brief is that the verdict is not supported by sufficient evidence. We have read and considered the whole of the testimony carefully, and are satisfied that there was sufficient evidence to warrant the jury in believing that Roggenkamp furnished the capital and Scott contributed his services and they engaged in the business of running a butcher or meat shop, the profits of such business to be shared equally. This would constitute them partners within the rule or definition announced by this court in the case of *Strader v. White*, 2 Neb., 348, where it was said: “If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the profits, he becomes a member of the firm and liable for its debts, although he do not stipulate to bear any part of the losses.” In the body of the opinion written by LAKE, J., we find the following statement: “It is argued, however, that there is no agreement on the part of the Whites to share in the losses which might occur, and therefore they cannot be held to be partners. This proposition is altogether untenable. In the first place they could receive no compensation for their skill and labor except out of the net profits. If these failed, they must necessarily share in the losses, at least to the extent of the value of the skill and labor contributed by them. It has been held

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Roggenkamp v. Hargreaves.

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that where one person advanced funds for carrying on a particular trade, and another furnished his personal services only in carrying on the trade, for which he was to receive a portion of the net profits, they were partners between themselves as well as to third persons." We are fully of the opinion that the evidence on the question of partnership was ample and strong enough to sustain the verdict and bring it within the rule of this court, so often expressed, that "when not clearly against the weight of the evidence, the verdict will not be disturbed." The same rule will apply to the contention made by plaintiff in error in regard to the facts that the claim in suit was for "smoked meats and hams." There was sufficient evidence to sustain the finding of the jury, that the smoked meats and hams were bought for sale in the business and with the knowledge of Roggenkamp, and the jury must necessarily have made such a finding as to this fact, as one of the component elements or facts of their whole verdict, as returned in the case.

The next assignment of error is that the court erred in giving to the jury instruction No. 4, which was as follows: "If you find from the evidence that the defendant Roggenkamp entered into an arrangement with Charles Scott, his co-defendant herein, whereby he became a partner of said Scott, in the business engaged in, and was to receive half the profits of said business, in pursuance of such agreement, such arrangement would make said Roggenkamp a partner of said Scott in their business, and he would be liable for debts contracted by the firm as partners in and about the carrying and management of said partnership business." It is contended that by this the jury were told that if they found that there was to be a division of the profits, this would constitute the defendants partners. This is not strictly correct, as it will be seen the jury were further told that they must find from the evidence that Roggenkamp and Scott had entered into an arrangement

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Roggenkamp v. Hargreaves.

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whereby they became partners. The instruction is not very clear and does not define a partnership, and under some circumstances we think it might be misleading and prejudicial; but immediately following this instruction the court, in its charge to the jury, gave instruction marked "First," as asked by defendants, as follows: "The jury are instructed that if you find that the agreement between Scott and Roggenkamp consisted only in Mr. Roggenkamp's furnishing three beeves to Scott for slaughter, and that Scott was to pay Roggenkamp the value thereof, and that Roggenkamp was to have one-half of the profits thereof, for the rent of the shop, tools, and slaughter house, that alone would not constitute a partnership or make the defendant Roggenkamp liable for the goods in controversy." By this instruction certain of the facts in evidence in the case were grouped together and the jury informed that if they concluded that such was the agreement, it did not constitute a partnership between defendants or make Roggenkamp liable for the goods. The only other possible grouping of the facts in the case on the question of partnership would so arrange them that the conclusion to be drawn from them must be that the defendants were partners in the meat business. In view of the fact that the court gave the further instruction above quoted, although instruction No. 4 was imperfect and not as clear and explicit as it should have been, we do not think it could have misled the jury or prejudiced the rights of defendants, and we do not think its giving was sufficient ground for a new trial. "The giving of an instruction which is imperfect or erroneous is not grounds for a new trial, where it could not have prejudiced the complaining parties." (*Converse v. Meyer*, 14 Neb., 190.)

Plaintiff in error objects to the verdict, that it is, both in form and substance, against Roggenkamp alone. We have reproduced the verdict in another part of this opinion, and by referring to the copy it will be ascertained that it was entitled "*Hargreaves Bros. v. William Roggenkamp*."

That this is not such a defect in form as will affect its validity as a verdict has been decided by this court in a case very similar to this, *Parrish v. McNeal*, 36 Neb., 727, in which the court says: "The only criticism upon the verdict, urged by counsel, relates to the title of the cause. No such objection was called to the attention of the court at the time the verdict was returned into court. Had it been, the defect, if any, doubtless would have been corrected before the jury were discharged. The title of the cause was not changed by permitting the administrator to appear and defend. The verdict was returned and filed in the proper action, and the title was sufficient to identify the verdict with the case. The omission of the name of the administrator as a defendant from the title was not such a defect as to prevent the entry of a judgment on the verdict."

The further and main objection to the verdict is its being against Roggenkamp, of defendants, alone and omitting the other defendant Scott. It must be borne in mind that this is an action on account, from all the information we can get from an examination of the record, against the individual members of the partnership, and it was competent and proper in such a case for the jury to return a verdict against one of the members of the firm, and such a verdict warranted the court in rendering judgment thereon against the party therein named. Section 429 of the Code of Civil Procedure provides as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs in favor of

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Roggenkamp v. Hargreaves.

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one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." (See also *Nebraska R. Co. v. Lett*, 8 Neb., 251; *Rowland v. Shephard*, 27 Neb., 494; *Anderson v. Fort Worth Base Ball Ass'n*, 14 S. W. Rep. [Tex.], 1016.)

There is the further thought here which has a bearing upon this branch of the case: Under the evidence, the jury, viewing it in the light of one set of facts, might well have determined that the meats were bought for Roggenkamp on his own account by Scott as his agent. The evidence to support a finding that this was the individual debt of Roggenkamp was strong and amply sufficient to sustain a verdict founded upon such a conclusion, and we are almost led to believe, from a careful perusal of the testimony, and the verdict as rendered by the jury, that this was the conclusion which they did reach; and if so, we think it would not be reversible error, under the pleadings in the case and evidence introduced. "In an action against two jointly, as partners, a recovery may be had against one alone, on proof that the debt sued for was his individual debt. Following *Maynard v. Ponder*, 75 Ga., 664." (*Ledbetter v. Dean*, 9 S. E. Rep. [Ga.], 720.) But if arrived at by the jury on either of the above theories of the case as presented in the evidence,—it is immaterial which,—the verdict was sustained by the testimony and there was no error in either its form or substance which calls for a reversal of the judgment. The judgment of the lower court is

**AFFIRMED.**

## JOHN T. MOLLYNEAUX V. MARCUS WITTENBERG ET AL.

39	547
43	595

FILED MARCH 6, 1894. No. 5598.

1. **Contracts: RESTRAINT OF TRADE.** Where real estate, consisting of certain lots and the buildings thereon, is sold, and in the granting portion of the deed conveying the same a clause is inserted stating that the property is not to be used for hotel purposes for two years, *held*, that such restriction as to use of the property, being a limited one, was valid and not an unreasonable restraint of trade in view of the facts developed by the pleadings (the case having been decided upon the pleadings alone), and that such agreement was not within or covered by the prohibitions or provisions of chapter 91a, entitled "Trusts," Compiled Statutes, 1893.
2. **Pleading: ALLEGATIONS OF REPLY.** A plaintiff, in replying to new matter set up in an answer, may allege new matter, not inconsistent with the petition, constituting a defense to such allegations contained in the answer. (*Cobbey v. Knapp*, 23 Neb., 579.)
3. **Damages for Breach of Contract.** Where a breach, by defendant, of an actually existing contract between plaintiff and defendant is proven, plaintiff is entitled to at least nominal damages.
4. **Judgment Upon Pleadings: REVIEW.** The pleadings in the case examined, and *held*, that the court erred in sustaining the motion of defendants for judgment upon the pleadings and in rendering judgment for defendants thereon.

ERROR from the district court of Clay county. Tried below before MORRIS, J.

*E. E. McGintie and Robert Ryan*, for plaintiff in error.

*G. W. Bemis*, contra.

HARRISON, J.

March 24, 1891, the plaintiff in the lower court, plaintiff in error here, filed a petition in the district court of Clay county, Nebraska, as follows:

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Mollyneaux v. Wittenberg.

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"1. Comes now the said plaintiff, and for a cause of action against the said defendants, says that heretofore, to-wit, on the 11th day of June, A. D. 1889, said plaintiff was the owner of certain real estate in Sutton, in Clay county, in the state of Nebraska, which said real estate is fully described in a deed executed by this plaintiff and Margaret A. Mollyneaux, his wife, on the 11th day of June, A. D. 1889, whereby the said property, to-wit:

"2. Lots 13, 14, and 15, in block 9, of the first addition to the town of Sutton, Clay county, Nebraska, were conveyed by the said plaintiff and his said wife to the said defendants, and his property was so conveyed by said plaintiff and his wife to said defendants in part consideration for the purchase by the said Margaret A. Mollyneaux of the following described property, to-wit:

"3. Lots 17, 18, 19, 20, 21, and 22, in block 20, in the original town of Sutton, in said Clay county, and as a part of consideration of said transfers it was then and there agreed by the said defendants, to and with this plaintiff, that the said real estate embraced in the said deed given by this plaintiff and his said wife as aforesaid should not be used for hotel purposes for the space of two years from said date of June 11, A. D. 1889. Copies of both said deeds are hereto attached and marked, respectively, Exhibits 'A' and 'B.'

"4. Plaintiff further says that immediately after said 11th day of June, A. D. 1889, relying upon his said agreement with the said defendants, he engaged in the business of keeping and managing a hotel upon the premises so conveyed to the said Margaret A. Mollyneaux, as shown in the said Exhibit 'B,' and has been ever since, and is now, engaged in the conducting of said business, and the purpose and object of the purchase of the said premises as shown in said Exhibit 'B' was the opening of plaintiff's said hotel, as defendants then and there well knew.

"5. Plaintiff further says that the said premises so conveyed to the said defendants constituted and constitute the only suitable place in said Sutton, Clay county, Nebraska, besides that now occupied by the said plaintiff, wherein the said business could be successfully carried on. Plaintiff further says, on or about the 17th day of September, A. D. 1889, the said defendants, wholly disregarding their agreement in that behalf, sold said premises described in Exhibit 'A,' for use as a hotel, and during all the time since, on or about September 17, 1889, have caused and permitted said premises so conveyed to said defendants, as aforesaid, to be used for hotel purposes, whereby the custom of the traveling public has been diverted away from the said hotel of the said plaintiff, and the custom and profits of the said plaintiff's hotel have been greatly diminished and reduced, and said plaintiff has been injured in his business thereby and has suffered great loss and damage in the sum of \$5,000.

"6. Wherefore plaintiff prays judgment against the said defendants for his damages in the said sum of \$5,000 and costs.

Exhibit "A," immediately after the description of the property in the conveying clause, contains these words: "With all the buildings thereon, the same not to be used for hotel purposes for two years from this date."

The defendants answered the petition as follows:

"Come now the defendants in the above entitled cause, and for answer to the plaintiff's petition herein filed respectfully show the court:

"1. The plaintiff, immediately after making the deed mentioned by him to defendants, began the business of keeping a hotel as stated by him in the fourth paragraph of his petition, but having a monopoly of the business for the time being, he conducted said business in such an unsatisfactory way, and gave such meager and poor accommodations to the traveling public, that the people generally,

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Mollyneaux v. Wittenberg.

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who had been theretofore accustomed to patronize the hotels in the said town of Sutton, became greatly dissatisfied, and justly complained that the said plaintiff gave very little value for the price charged to his guests, and many of them became prejudiced against said hotel and against the plaintiff herein, and against the said town of Sutton, and threatened to cease making business visits to said town. The defendants further show that by reason of the facts as above set forth, a large number of the principal capitalists and public-spirited citizens of the town of Sutton began the project of building and opening a new and distinct hotel from either of those mentioned in the petition of plaintiff, and for that purpose and with the intent began to pledge, and secure pledges for, large sums of money to carry out such project. None of the defendants herein aided in any way the said project of building a new hotel, nor sympathized with said movement, nor gave to the same any encouragement whatever.

“2. Of the facts above set forth the plaintiff had then full knowledge, and in consideration of the danger to his said business to be expected from the permanent competition of said proposed new hotel, and in consideration of the prospect that the building of said new hotel would be much more injurious to his private business interests than the opening of the hotel of these defendants, said plaintiff voluntarily requested the defendant to open their said hotel to the public, and requested them to lease the same to any party to be found that would open a hotel and run the same, in order to discourage and prevent the building and opening of the new hotel, as aforesaid, about to be built.

“3. The defendants, being then considering the plan of remodeling the said hotel deeded to them by said plaintiff and wife, so as to rent the same for store purposes, or for some business other than a hotel, refused to rent the same for a hotel, although the plaintiff was anxious to have the same done for his benefit.

"4. After repeated solicitations on the part of plaintiff herein, and at his special instance and request, defendants sold said hotel, which was known as the 'Occidental Hotel,' and the purchaser opened business about October 1, 1889, and not before.

"5. Before the opening of said Occidental Hotel, in consideration of all the foregoing facts, and in consideration that the same was beneficial to plaintiff, and in consideration of the prevention of the building and opening of the third hotel, as aforesaid, and in consideration of the removal of prejudice from among the traveling public, the said plaintiff, on the 17th day of September, 1889, waived in writing the clause in the deed made by him to defendants, and thereby consented to have said hotel opened, and by said instrument of writing waived all rights which he had to a monopoly of the said business in said town of Sutton, which town has above 1,600 inhabitants. A true copy of said written waiver and consent is attached hereto and made a part hereof by reference as Exhibit 'A,' as fully as though the same were fully set forth in this answer.

"6. The sale of the said Occidental Hotel and the opening of the same to the public accomplished the object intended by the said plaintiff and prevented the establishment of a new rival in business, and was of benefit to him, and to the value of the said property which he got in exchange for the Occidental Hotel. The plaintiff has, therefore, sustained no damage whatever by reason of the yielding of defendants to his desire in the premises.

"7. The falling off in business of the plaintiff, if any, is not because of any action of the defendants herein, but because of the fault of the plaintiff in forfeiting the goodwill of the public by furnishing poor entertainment when he had the only hotel in the town of Sutton, and partly by reason of the general stringency in all business in the west by reason of financial depression and distress common to all branches of business during the time mentioned in the petition, and especially the hotel business.

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"Wherefore the plaintiff ought not to maintain his said action, and these defendants ask to go hence without day and recover their costs."

Exhibit "A," as attached to the answer:

"SUTTON, NEB., Sept. 17, 1889.

"To whom it may concern: Be it known that we, John T. Mollyneaux and Margaret A. Mollyneaux, hereby waive all rights we may have by virtue of a clause in a certain deed dated June 11, 1889, to M. Wittenberg and others, to lots 13, 14, and 15, in block 9, first addition to Sutton, Nebraska, whereby the Occidental Hotel, situated on said lots, was not to be used for hotel purposes, and we do now, by these presents, consent that said property be opened as a hotel, provided the maximum rate of said hotel shall be \$1 per day, and provided a greater sum is charged, this agreement shall be null and void, and the clause in said deed shall be binding on the owners of said above described property.

MARGARET A. MOLLYNEAUX.

"J. T. MOLLYNEAUX."

The following reply to the answer was filed by plaintiff:

"Comes now the said plaintiff and for reply to defendants' answer herein admits the making of the agreement of said Margaret A. Mollyneaux and this plaintiff, as shown in Exhibit 'A' attached to defendants' answer, but plaintiff alleges that the conditions of said agreement have not been fulfilled, and that ever since, very shortly after the 17th day of September, A. D. 1889, the said hotel, so agreed to be allowed to be opened on lots 13, 14, and 15, in block 9, first addition to Sutton, Nebraska, has charged for the accommodation of guests therein a greater sum than \$1 per day for the boarding and lodging of such guests, and the maximum rate of said hotel has not been \$1 per day, but has been a greater sum, and said agreement of September 17, 1889, has thereby become null and void and the original contract, as shown by the deed referred to in said Exhibit 'A,' has become again in full force and effect.

"2. Plaintiff, further replying, denies each and every allegation of new matter in said defendants' answer contained which is not hereinbefore specifically admitted."

To the reply a demurrer was filed and on hearing overruled. Defendants then filed the following motion:

"Now, to-wit, this 17th day of November, 1891, a day of the November term of above court, and before the calling of a jury in this case, come defendants and move the court to render a judgment of dismissal of said cause, and allow defendants to go hence without day, for the following reasons, to-wit:

"First—The petition filed in said cause does not state sufficient facts to constitute a cause of action, because—

"(a.) The said clause in said deed from plaintiff to defendants, whereby it is provided that the property therein described shall not be used for 'hotel purposes' for two years, is void and of no force, because said clause is inconsistent with the grant made by said deed; and further, because said restriction in said deed is against public policy; further, because,

"(b.) Said clause of said deed restricting the use of said premises is void, because it is in contravention of the laws of Nebraska, page 516 of the Session Laws of 1889.

"(c.) Further, said clause in said deed is void, because the same interferes with the fundamental right of dominion over one's property by the absolute owner thereof.

"(d.) The said deed, set forth and exhibited by said plaintiff in his petition herein, grants the premises in said petition and deed described forever, and warrants and guarantees the quiet enjoyment thereof forever to the defendants and assigns forever, and said grant and warranty cannot be affected by a naked recital of restriction inconsistent with the grant forever in said deed made.

"(e.) The said clause in said deed and petition referred to, whereby it is attempted to be provided that the real estate described in said deed, petition, and exhibit attached

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thereto shall not be used for 'hotel purposes for two years,' is void, because no consideration therefor appears in said deed, nor is any alleged in said petition; therefore, said condition is a nullity.

"(f.) The bare recital in said deed, 'not to be used for hotel purposes for two years,' does not possess the element of a contract, and is an unreasonable restraint upon trade, and, therefore, void.

"Second—The plaintiff in his reply admits that the restriction in said deed was waived, annulled, and abrogated by a new contract made months subsequent to the giving of said deed, and in said new contract, set out for the first time in the answer of defendants, it is provided that said clause in said deed, set forth in said petition, is annulled on condition that said hotel may be opened at \$1 per day, therefore said new contract was and is a merger of the former clause in said deed, and said former clause has no standing nor effect, except as an inducement to the new contract; said old contract, being void, furnished no consideration for the new agreement. The measure of damages, as charged by the new contract and the pleadings, show a merger of the contract declared upon, and no testimony is required.

"Wherefore the defendants pray for judgment of dismissal."

The motion was sustained, to which action of the court plaintiff excepted, and judgment was rendered in favor of defendants and against plaintiff and for costs of the action. The plaintiff complains of the decision of the court, sustaining the motion and rendering judgment for defendants, and brings the case here for review.

The case in this court is argued upon three propositions,—one being that the agreement not to use the building for hotel purposes was in restraint of trade and void, because contrary to the rule of common law governing such contracts; a second being that the agreement was objection-

able and void under the provisions of chapter 91a, Compiled Statutes of 1893, entitled "Trusts;" and a third, that the petition set up as a cause of action one contract, the one contained in the clause in the deed, and the reply set up a different one, to-wit, the agreement contained in Exhibit "A," attached to answer, known in the case as the "Waiver," and was a departure from the cause of action stated in the petition. The petition states that the agreement to not run a hotel on the premises entered into the consideration moving between the parties to the transfer of property and was a material part of such consideration. This is not denied in the answer, and, as we have only the pleadings to consider in arriving at a conclusion here, must be taken as admitted. The contract not to use the premises for hotel purposes was a limitation in itself, necessarily confining it, as to place, to the particular lots and building, and the time was limited to "two years." These limitations clearly relieve the agreement of any objection made to it on the ground that it is obnoxious to the common law rule governing contracts in restraint of trade, if, coupled with the above limitations, the contract was reasonable. A contract made upon a valuable consideration, and which does not impose an unreasonable restraint upon engaging in business, is valid. This may be said to be an almost universal rule, so often has it been passed upon and, with some modifications, which do not exist in this case, sustained. (See *Angier v. Webber*, 92 Am. Dec. [Mass.], 748; and for a discussion of the subject see note to the above case on page 751 of same report, which contains a full citation of authorities.)

In reaching a conclusion as to whether or not the agreement in this case was a reasonable one we must not lose sight of the fact that we are confined to the pleadings in the case for enlightenment upon this as well as all other points raised for our decision. The allegations of the answer are confined mainly, as to this part of the case, to

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statements setting forth the manner in which plaintiff conducted his hotel business, stating that it was unsatisfactory and did not please the traveling public or the citizens; but these allegations are all denied in the reply of plaintiff, hence we are left with no, or not sufficient, information upon which to base an opinion regarding the reasonableness or unreasonableness of the restraint upon the business so far as it affected the public. The act cited by defendant in error, chapter 69, Session Laws of 1889, chapter 91a, entitled "Trusts," Compiled Statutes, 1893, page 838, provides in section 1 thereof, among other things, as follows: "It shall be unlawful for any person or persons, partnership, company, association, or corporation organized for any purpose whatever, or engaged in the manufacture or sale of articles of commerce or consumption, or for any such person or persons, \* \* \* dealing in any natural product, to enter into any contract, agreement, or combination with any other person or persons, \* \* \* doing business in this state, \* \* \* engaged in the manufacturing, selling, or dealing in the same, or any like manufactured or natural product whereby a common price shall be fixed for any such article or product, or whereby the manufacture or sale thereof shall be limited or the amount, extent, or number of such product to be sold or manufactured shall be determined, or whereby any one or more of the combining or contracting parties shall suspend or cease the sale or manufacture of such products, or whereby the products or profits of such manufacture or sale shall be made a common fund to be divided among the respective persons, partnerships, companies, association, or corporation so entering into such contract, agreement, or combination." This section is followed by one prohibiting trusts and pools of all kinds for any purpose whatever, and by further sections in regard to penalties and forfeitures, etc. The defendants in error strenuously argue that the case at bar is within the provisions of the act above cited, but we do

not think so. The act applies to persons "engaged in the manufacture or sale of any article of commerce or consumption," "or dealers in any natural product," and prohibits them from entering into certain contracts, agreements, etc. The contract in this case, to not use the premises for hotel purposes, clearly is not covered by the terms or meaning of section 1 of the above act. A pool is defined to be "a combination of persons contributing money to be used for the purpose of increasing or depressing the market price of stocks, grain, or other commodities; also the aggregate of sums so contributed. Webster. See 103 U. S., 168." (Black's Law Dictionary, p. 910.) Black in his Law Dictionary, p. 1192, defines trusts as follows: "In mercantile law. An organization of persons or corporations, formed mainly for the purpose of regulating the supply and price of commodities, etc." The agreement under consideration cannot be said to come within the definition of either a "pool" or "trust," as these designations are now commonly understood, and the parties were not prohibited from entering into the agreement they did make by this act of the legislature.

Having concluded that the agreement was valid, then it follows that the petition declaring upon it stated a cause of action, there being alleged, first, a valid contract; second, a breach of it; and third, the damage arising from such breach. The answer admits almost everything pleaded in the petition, possibly denying that plaintiff suffered any damage, alleges matter in avoidance, and sets up affirmatively the "waiver." The reply meets the portion of the answer founded upon the waiver, by affirmatively stating that the defendants have failed to comply with the provisions of the waiver, and it is of this allegation in the reply that complaint is made by defendants, they contending that it was an attempt by plaintiff to introduce a new cause of action by his reply different from that stated in the petition. If the recovery, if any, by plaintiff on a trial of

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the case would be founded upon the waiver, and for a breach of its conditions alone, then this position is a true one. On the other hand, if the matter alleged in the reply relating to the waiver set up in the answer, and constituting a defense to it was not inconsistent with the petition, then it is not a true position. After a careful examination of the pleadings we are satisfied that the action of the plaintiff was necessarily founded upon the original agreement of defendants not to use the property for hotel purposes, and its breach, the waiver being merely collateral to the original contract and incident to it and purely a matter of defense; that the cause of action set up in the petition was complete without alleging the waiver and negating its force or effect; that when the waiver was alleged in defendants' answer as matter of defense it was proper and good pleading to deny it, or affirmatively show by the reply that defendants had, by their failure to comply with some of its requirements, or rather by their violation of such requirements or conditions, rendered it of no value or force, and destroyed any effect it might otherwise have had in releasing the defendants from the original agreement, and if evidence had been introduced which established the plaintiff's contention as pleaded in the reply, the waiver would have been fully avoided and the plaintiff entitled to damages, not under the waiver, but from the breach of the original contract or agreement, to which waiver, by its terms, refers the parties. "A plaintiff, in replying to new matter set up in an answer, may allege any new matter, not inconsistent with the petition, constituting a defense to such allegations contained in the answer." (*Cobbey v. Knapp*, 23 Neb., 579.)

It may be well before leaving the case to touch upon that branch of it regarding damages. If plaintiff was entitled to no damages, then the court was right in its judgment; but let us examine. The allegation of the petition in respect to damages reads as follows: "Whereby the

custom of the traveling public has been diverted away from said hotel of said plaintiff, and the custom and profits of said plaintiff's hotel have been greatly diminished and reduced, and said plaintiff has been injured in his business thereby, and has suffered great loss and damage in the sum of \$5,000." We think it very doubtful under this statement whether any evidence could be received on the question of damages, as just how it could be shown that persons went to the other hotel who would or might have patronized plaintiff's place of business if the other had not been opened or it had been running at \$1 per day, and how much profit plaintiff might have realized from their entertainment if they had stopped at his hotel, we are not able to discern; but however this may be, when the case was passed upon by the court below it was as the issues then stood, established by the pleadings in the case, that there was a contract between plaintiff and defendants and a breach of the same by defendants. If plaintiff, on a trial of the cause, had been able to sustain the case in its same condition as made by the pleadings, he would have been entitled to nominal damages at least. Where a contract between parties is proved, and a breach of it by defendant, the plaintiff is always entitled to at least nominal damages. (3 Parsons, Contracts, pp. 217-219; 1 Wood's Mayne, Damages, pp. 9-16, and notes.) This rule is supported by numerous authorities and seems not to be doubted or questioned. The action of the court below was wrong and is reversed and the case remanded.

**REVERSED AND REMANDED.**

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Rathbun v. Dooley.

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ALLEN RATHBUN, APPELLEE, v. THOMAS DOOLEY  
ET AL., APPELLANTS.

FILED MARCH 6, 1894. No. 5085.

**Review: CREDITOR'S BILL: SUFFICIENCY OF EVIDENCE.** The evidence in support of a creditor's bill being sufficient to sustain the finding of the trial court, its judgment must be affirmed when no other question than such sufficiency is presented by the record.

APPEAL from the district court of Dodge county.  
Heard below before POST, J.

*Howard B. Smith and C. Hollenbeck, for appellants.*

*Frick & Dolezal, contra.*

RYAN, C.

The appellee on March 20, 1889, filed his petition in the district court of Dodge county, Nebraska, wherein he alleged that on May 9, 1888, he had obtained a judgment in the county court of said county against Thomas Dooley for the sum of \$748.21 and costs; that thereafter execution had been issued for the collection of said judgment, but that the same had been returned wholly unsatisfied; that the recovery of judgment in the said county court was upon a judgment rendered in the supreme court of the state of New York in and for Washington county, October 30, 1885; that while the suit was pending which resulted in the above judgment in the aforesaid supreme court, Thomas Dooley resided in said Washington county, and was there possessed of real and personal property of the value of \$4,500; that said Thomas Dooley and his wife, Ellen Dooley, conspired together to defeat the collection of the judgment last mentioned, and to accomplish that purpose disposed of and converted into money the property held in

New York and with the proceeds thereof came to Nebraska; that to further the said design the said money was deposited in a bank at Omaha, of which John L. McCague, William L. McCague, Thomas H. McCague, and Alex. C. Charlton were proprietors, and that the certificate evidencing said deposit of \$4,142.10 was, at the time of filing the petition, held by the defendant Richards and John W. Goff. The plaintiff in his petition charged that unless restrained, the two defendants last named would place said certificate of deposit beyond the reach of the process of the court, and that the proprietors of the bank which issued said certificate would cause the said certificate to be taken up by paying the same, whereby irreparable injury would result to plaintiff. There were the ordinary averments to justify relief upon a creditor's bill presented for subjecting said certificate of deposit to the payment of the judgment rendered in the county court of Dodge county aforesaid, followed by a prayer for equitable relief of the nature above indicated.

The answers of Thomas Dooley and Ellen Dooley were filed separately, but were alike in their terms, for each of said defendants admitted the recovery of the alleged judgment in the county court of Dodge county and the issue of execution thereon. All other averments of the petition were met by a general denial. It is unnecessary to summarize the answers of the other defendants, for neither presented any averment or denial pertinent to the main issue in the case; that is, whether or not the certificate of deposit above referred to was taken in the name of, and held by, Ellen Dooley for the purpose of preventing the application of the amount thereby evidenced as due to the payment of the judgment against Thomas Dooley, as of right it should be applied.

There was evidence amply sufficient to sustain the findings in favor of plaintiff upon the several questions in controversy. They must therefore be accepted as established

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facts, which the court will not disturb. (*Worthington v. Worthington*, 32 Neb., 334.) The record presents no question save that of the sufficiency of the evidence to sustain the judgment of the district court, and a review of it could subserve no useful purpose in this or for any other case. The judgment of the district court is

AFFIRMED.

Post, J., having tried the case in the court below, took no part in the above decision.

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LUCY T. ST. CLAIR, APPELLANT, V. SAMUEL H. SEDGWICK ET AL., APPELLEES.

FILED MARCH 6, 1894. No. 5115.

1. **Estrepelement: EVIDENCE: INJUNCTION.** An action against one in possession of real estate to restrain alleged commissions of waste thereon was properly dismissed when the court found from the proofs that no waste had been contemplated or committed by either of the defendants.
2. **Action to Restrain Commission of Waste: LIEN ON NURSERY STOCK: DECREE.** Where one has instituted proceedings to prevent the commission of waste upon real property and for general equitable relief, and the defendant in such suit has pleaded and proved his rightful possession of certain nursery stock growing on the premises to secure part of the purchase price of said stock remaining unpaid, *held*, that the court, in conformity with the prayer of said defendant's answer, properly decreed that such nursery stock should be sold on execution to pay the amount found remaining due.

APPEAL from the district court of York county. Heard below before MILLER, J.

*George B. France and Merton Meeker, for appellant.*

*Sedgwick & Power and George W. Bemis, contra.*

RYAN, C.

In her petition the plaintiff Lucy T. St. Clair alleged that on September 27, 1890, she purchased of the defendant S. H. Sedgwick 150 acres of land in York county, Nebraska, which land was fully described in the petition; that by virtue of said purchase the said Sedgwick agreed to deliver the possession of said real estate to plaintiff on or before March 1, 1891, as evidenced by a deed of conveyance on that date executed by Samuel H. Sedgwick and his wife to the plaintiff; that at the last mentioned date the co-defendants of Samuel H. Sedgwick were in possession of the real property so conveyed as lessees of said Sedgwick, their rights as lessees being limited in duration to the 1st of March aforesaid, and that at the time of the aforesaid purchase it was agreed by the said Samuel H. Sedgwick that he would commit no waste upon said premises, and that he would not cut down or destroy any fruit, shade, or ornamental trees standing upon said premises. Plaintiff further alleged that she became the owner of certain nursery stock on the premises aforesaid before the date of the conveyance above referred to, and that since said conveyance, and before the commencement of this action, she had paid the full purchase price for said nursery stock and had paid in full for the said real estate; that defendants, having unlawfully combined for that purpose, had cut down and removed many valuable growing trees from the premises aforesaid, and had threatened to, and if not restrained would still continue to cut down, destroy, and remove trees and vines from said premises, to the great and irreparable injury of the plaintiff. It was further alleged by the plaintiff that the co-defendants of said Samuel H. Sedgwick having refused to give up to plaintiff the possession of the buildings on said premises on March 1, 1891, plaintiff served notice upon them to quit said premises, and upon their continued refusal thereafter to yield possession to her the plaintiff

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legun an action of forcible entry and detainer before the county judge of York county aforesaid for such possession, and that the trial of said cause for the forcible entry and detainer of said property was, upon the application of said defendants, procured to be continued thirty days from March 16, 1891, the date set for the trial thereof, and that the prolongation of the litigation of said forcible entry and detainer case was with the view to further the common unlawful designs of the defendants as against the rights of plaintiff. This petition closed with a prayer for a temporary injunction restraining the defendants from cutting down trees upon said premises; from burning up or hauling away any of the timber or wood, or fuel already cut; from selling or disposing of any of said timber, and from intermeddling in any way with any of the trees, timber, wood, or personal property of the plaintiff; and from preventing the plaintiff or her agents from cultivating the nursery stock on the premises, and from handling the same, and from preventing plaintiff from going on said premises for the purpose of such cultivation and the removing of said nursery stock and wood, and that upon a final hearing the injunction should be made perpetual, and that the plaintiff should be decreed such further relief as might be just and equitable.

The answers filed need no notice except that to which attention is now directed.

With varying degrees of directness as to each averment of the petition the several allegations thereof were denied by defendant Sedgwick's answer, by whom it was also denied that the nursery stock had been fully paid for; that there was a combination between defendants for any purpose; that defendant Sedgwick had instigated any one to commit waste or damage on the premises in dispute; and that said Sedgwick proposed or intended any unlawful act. The answer further alleged that no trees had been cut down by defendants of more than the value of \$8 or \$10 in the ag-

gregate, and that the removal of such as had been cut was not a damage, but a benefit, and necessary to the use of the premises in question; that defendant Sedgwick, on July 3, 1890, was the owner of the nursery stock on the premises in question, and on that date, by a written memorandum of agreement between himself and Emmet L. St. Clair, husband of the plaintiff, sold to Emmet L. St. Clair the nursery stock on the premises for the sum of \$1,300, of which \$910 had been paid at the time this action was brought, and that by the terms of said memorandum defendant Sedgwick was entitled to the possession of said nursery stock until the purchase price thereof should be fully paid. The answer further admitted the commencement by plaintiff of the forcible entry and detainer action as alleged in plaintiff's petition, and that the trial of the same had been postponed upon such a showing by the defendants therein, as said defendants had a right to make; and the answer alleged that subsequently judgment was rendered against said defendants in said forcible entry and detainer case, which judgment had been superseded by the defendants, pending error proceedings which they had begun in the district court of York county, which proceedings had not at the time of the filing of defendants' answer been yet determined. This answer closed with the following prayer: "Wherefore this answering defendant prays that the injunction heretofore granted in this case may be dissolved, and that he may have a decree of this court finding, ascertaining, and stating the amount of his lien upon the aforesaid nursery stock, and decreeing that the said nursery stock may be sold as the law provides, and out of the proceeds thereof that this answering defendant may be paid the amount found due him thereon and his costs herein expended, and for a temporary order of injunction restraining the plaintiff, her agents or attorneys, from taking, disposing of, or interfering with the said nursery stock, or any part thereof, without paying to this defendant the

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amount of his aforesaid lien thereon and the costs herein, and that upon a trial of this action the said injunction may be made perpetual, and that the said plaintiff, her agents and attorneys, may be restrained from trespassing on the aforesaid premises, or any part thereof, during the pendency of this action, and that upon the final trial said injunction may be made perpetual, and for such further relief as may be just and equitable." The allegations of the answer upon which was predicated the right of the defendant Sedgwick to affirmative relief were denied in a reply filed by the plaintiff.

Upon final hearing the court found the facts and decreed the relief following: "The court, being fully advised in the premises, doth find for the defendants on the issues joined between the parties. The court further finds that the defendants, nor any of them, have not heretofore nor is there danger that they will commit any waste upon the premises or property mentioned in plaintiff's petition. It is therefore considered by the court that the plaintiff's petition be dismissed and the said injunction be dissolved and that the defendants as to said petition go hence without day; \* \* \* and upon consideration of the answer and cross-petition of the defendant Samuel H. Sedgwick, and the answer thereto, and the reply, and the evidence introduced by the parties, the court finds the issues thereon in favor of the defendant Samuel H. Sedgwick, and that there is due from the defendant Emmet L. St. Clair to the defendant Samuel H. Sedgwick on the cause of action set forth in said answer and cross-petition, after allowing upon said cause of action the value of the colt described in the pleadings herein, and the value of that part of the nursery stock taken and appropriated by the defendant Samuel H. Sedgwick, and all just credits, the sum of \$260, and that the defendant has a lien in the said sum of \$260 upon the nursery stock described in said cross-petition, in the nature of a chattel mortgage, and is by virtue of said lien entitled

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to the possession of the same, and has remained in possession, and is now in possession of said nursery stock and entitled to have said property sold to satisfy the same; and that prior to the commencement of this action the defendant Emmet L. St. Clair transferred said nursery stock to the plaintiff in this action, and the plaintiff took the same with full knowledge of said interest and lien of said defendant Samuel H. Sedgwick. The court further finds that the said property is of such nature as to make removal of the same detrimental to the value thereof. It is therefore considered by the court that the defendant Samuel H. Sedgwick recover from the defendant Emmet L. St. Clair the sum of \$260 and his costs, and that the same bear interest at eight per cent per annum; and in case said sum is not paid for forty days, then an order of sale will be issued to the sheriff of said county commanding him to sell said property as upon execution, and the said sheriff is authorized in his discretion to sell the said property where the same now is." \* \* \*

A careful examination of all the evidence shows that the principal matters in controversy were, first, the right and intention to cut trees from the premises; and, second, the right to hold possession of the nursery stock for payment of the amount due Mr. Sedgwick as part of the purchase price thereof. There was, of course, evidence that Mr. Sedgwick permitted, and that his co-defendants removed valuable ash and other trees from the premises, some of which trees were two or three feet in diameter at the butt, and that such as were removed were thrifty trees of great present, and of still greater prospective, value. On the other hand, the testimony was that the trees cut were not such as were thrifty or growing trees, but were in the highway or such as the Blue river was very likely to cut under and carry away, and that these latter trees were removed at the particular time at which they were because the ice then gave an unusual opportunity so to do by reason of its great

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thickness and strength, and that when there was no ice there was no way by which said trees could be cut and removed because of their overhanging the river. It was testified that the cutting and removal of most of such trees as were cut and removed rather increased the value of the premises in controversy than lessened it. It was not even claimed that the chief defendant, Samuel H. Sedgwick, was insolvent, nor was there any reason shown why full compensation could not be collected in a suit against Sedgwick for such damages as the petition alleged, provided the proofs had sustained such allegations. The trial court found the facts in favor of the defendant upon the conflicting evidence above referred to, and there exists no reason for setting aside such finding as to the facts contested.

As to the nursery stock, the written memorandum introduced in evidence showed that Mr. Sedgwick was entitled to the possession of it until the purchase price thereof had been fully paid. While it was testified by Mr. and Mrs. St. Clair that the balance due for the nursery stock was included in the mortgage given by them for the premises, yet upon this point they were squarely contradicted by Mr. Sedgwick, whose statements were corroborated by a written memorandum signed by Mr. and Mrs. St. Clair and himself, in which the several amounts making up the mortgage referred to were set forth in detail. This finding of the district court was, therefore, fully justified by the evidence upon the proposition last discussed.

These considerations dispose of all questions arising upon the record, and the judgment of the district court is

**AFFIRMED.**

## HENRY ALDRICH v. WILLIAM H. BRUSS.

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FILED MARCH 6, 1894. No. 5533.

1. **Appeal: FAILURE TO FILE TRANSCRIPT IN TIME: DISMISSAL.**

An appeal from the county court to the district court should be dismissed upon proper motion when the transcript was not filed within thirty days from the date of the judgment and no reason is shown for the delay. Following *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521.

2. **Review: AFFIDAVITS ON MOTIONS: BILL OF EXCEPTIONS.**

Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions. Following *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521.

ERROR from the district court of Nance county. Tried below before SULLIVAN, J.

*Reid & Morgan*, for plaintiff in error.

*Martin I. Brower*, contra.

RYAN, C.

Plaintiff in error complains that his appeal from the county court of Nance county was dismissed in the district court because the transcript was not filed within thirty days from the date of the judgment. There was probably an attempt to excuse the above failure by a showing of facts made by affidavit not incorporated in a bill of exceptions. Following the rules laid down in *Maggard v. Van Duyn*, 36 Neb., 862, and *Barry v. Barry*, 39 Neb., 521, the judgment of the district court is

**AFFIRMED.**

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State v. Sabin.

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STATE OF NEBRASKA, EX REL. POMERENE & COOPER,  
v. D. G. SABIN, TREASURER.

FILED MARCH 6, 1894. No. 4811.

**Mandamus: SCHOOL DISTRICT WARRANTS: PAYMENT BY TREASURER.** A writ of *mandamus* cannot issue to the treasurer of a school district requiring payment by him of an order payable by its terms at a fixed time in the future and in the meantime drawing interest at a rate per centum defined by the terms of the order itself.

ORIGINAL application for *mandamus*.

*Lamb, Ricketts & Wilson*, for relators, cited: *State v. Gandy*, 12 Neb., 232; *State v. Scott*, 15 Neb., 147; *State v. Leidtke*, 12 Neb., 171; *State v. Roderick*, 23 Neb., 505; *Everts District Township of Rose Grove*, 77 Ia., 37; *Capital Bank of St. Paul v. School District No. 85*, 42 N. W. Rep. [Dak.], 774; *Robbins v. School District*, 10 Minn., 268; *Maher v. State*, 32 Neb., 369.

*Steele Bros., contra*, cited: *School District v. Stough*, 4 Neb., 357; *Nevil v. Clifford*, 24 N. W. Rep. [Wis.], 65; *Gehling v. School District*, 10 Neb., 239.

*A. J. Evans*, also for respondent.

RYAN, C.

This proceeding was instituted June 30, 1891, to compel payment by the defendant of an order, of which the following is a copy:

"\$500.           DAVID CITY, NEB., September 2, 1889.

"State of Nebraska, Butler county: Treasurer of School District No. 56 of Butler County: On the first day of March, 1891, pay to the order of Pomerene & Percival the sum of five hundred and  $\frac{00}{100}$  dollars out of any money in

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your hands belonging to the fund for general purposes.  
Interest, seven per cent per annum from date until paid.

"GEO. P. SHEESLEY, *Director*.

"Countersigned:

"H. W. KELLER, *Moderator*.

"No. 14138."

The relators in their petition averred that by the terms of the instrument aforesaid it matured on the 1st day of March, 1891, and that the said order, at the time of the commencement of this proceeding, was the property of the relators, whose demand of payment had been refused by the defendant, though the said defendant had in his hands sufficient funds with which to make full payment of the same and could properly have done so. There was, soon after this action was begun, a reference thereof and quite a large amount of evidence was taken by the referee in support of the contentions of each party, for which reason it is deemed but fair to decide this controversy, notwithstanding it is one which should not have been brought in this court in the first instance. The order copied above was of date September 2, 1889, due March 1, 1891, for \$500, and, by the terms of the instrument itself, this sum drew interest at the rate of seven per cent per annum. This was, therefore, not a mere order drawn against some fund specified and in existence; it was rather an order payable out of a fund entirely to be provided for in the future.

In *School District No. 2, Dixon County, v. Stough*, 4 Neb., 357, LAKE, J., delivering the opinion of this court, said: "Contracts for the erection of a school house should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof on a fund which has been proposed but not raised by taxation." The rule stated is as applicable to orders of the class under consideration as to those referred to in the above opinion; *i. e.*, those for the erection of a school house. The contract for supplying the school building at David

City with steam heating apparatus was dated July 4, 1889, and required that the work stipulated should be completed by September 2 immediately following. In payment three so-called orders were to be issued for the sum of \$500 each, due respectively May 1, September 1, 1890, and March 1, 1891. This was directly issuing evidence of indebtedness against the school district due respectively in six, twelve, and eighteen months from date. Notwithstanding the above quoted language of Judge LAKE, the relators insist that the following quotation from *Maher v. State*, 32 Neb., 369, justifies the issuance of the order sought to be collected in this proceeding. The language was used by Judge COBB in the opinion referred to, and is as follows: "In the case of *Robbins v. School District No. 1, Anoka County*, 10 Minn., 268, it was held that 'instruments in the form of promissory notes payable at a future date with interest beyond the statute rate, executed for the district by the trustees for an indebtedness incurred by the district, are valid between the parties as a contract for forbearance and a promise to pay the amount specified, but a judgment on them can be enforced only against the fund raised by levying the amount of tax authorized.'" The case in which the above quotation was made was a *mandamus* proceeding to compel the treasurer therein named to pay an order, in the following language:

"§125. STATE OF NEBRASKA, DAKOTA COUNTY,

"July 14, 1890.

"Treasurer of School District No. 11, Dakota County:  
Pay to the order of Allen & Jenkins the sum of one hundred and twenty-five dollars out of any money in your hands belonging to the fund for building.

"JNO. A. WILLIAMS, *Director*.

"Countersigned:

"W. B. AMMERMAN, *Moderator*.

"No. 60."

Immediately preceding the quotation just made from the case of *Maher v. State* there was a discussion of the power of the electors of a district to ratify an action not authorized. Just following the quotation were statements that the school board issued the warrant copied in payment for labor and material used in the construction of a school house pursuant to a contract with the relators, etc. The quotation from *Robbins v. School District* seems to have been made without any reference to the facts under discussion, and, hence, is mere dictum, not necessary to the determination of the case of *Maher v. State*. The Minnesota case cited proceeded upon the ground that there was no inhibition in the law of that state against incurring an indebtedness in excess of what could be met with the taxes of one year. The notes given by the directors as individuals for the rent of premises to be used from year to year for school purposes were therefore held valid as between the parties as a contract for forbearance until the requisite taxes could be levied, assessed, collected, and paid to the trustees, and as binding the trustees and their successors in office to make such payments as had been agreed in said notes. This case, cited in the manner in which it was cited in *Maher v. State, supra*, has no controlling weight or application in this state, and should, therefore, be accorded no consideration as against the rule laid down in *School District v. Stough, supra*. If evidences of indebtedness of the nature of that sought to be enforced in this action are to be held valid and binding, it will render wholly inoperative and useless the provisions of the statute regulating and restricting the issuance of bonds by school districts.

To warrant the granting of a *mandamus* it must appear that the relator has a clear legal right to the performance by the respondent of the particular duty sought to be enforced. (*State v. City of Omaha*, 14 Neb., 265; *Anderson v. Colson*, 1 Neb., 172; *State v. School District No. 9, York County*, 8 Neb., 94; High, Legal Rem., sec. 10.) What,

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if any, may be the proper remedy available to the relators upon the facts in this case, we are not called upon to determine. Certainly it is not by *mandamus*, and the writ is therefore denied.

WRIT DENIED.

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HARVEY W. MASTERS V. HENRY J. LEE.

FILED MARCH 6, 1894. No. 4903.

**Commercial Agencies: DAMAGES: LIABILITY OF MEMBERS:**

**LIBEL: CONSPIRACY.** The constitution of an association of retail dealers provided: "Whenever an account against any person shall have been listed in the abstract of unsettled accounts issued by our general association, or certified to the secretary of this branch by said association as unsettled, no member shall in any case open an account without security with such delinquent, and the opening of such account by any member with such person shall be considered a misdemeanor, and subject such member to an investigation by the executive board, and if found guilty he shall pay to said board a fine of twenty dollars for the sole use and benefit of this branch, and his neglect or refusal to comply with this demand shall make him liable to expulsion from said association." In an action for damages against one of the members of said association by an alleged delinquent against whom a claim had been, by the defendant, procured to be listed, *held*, that the defendant thereby rendered himself liable for all damages sustained by the plaintiff by reason of said listing and the publication of his alleged delinquency, whether such damage was owing to a technical libel or to the refusal of members of said association to extend credit to plaintiff because of the provision above quoted in relation to listing and publication.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J.

*C. Hollenbeck and Frick & Dolezal*, for plaintiff in error, contending that upon the ground of conspiracy the right of

plaintiff to recover is complete and unavoidable, cited: *Muetze v. Tuteur*, 46 N. W. Rep. [Wis.], 124; *Cooley, Torts*, 421; *Albrecht v. Treitschke*, 17 Neb., 205; *Carew v. Rutherford*, 106 Mass., 1; *Gregory v. Brunswick*, 6 Man. & Gr. [Eng.], 205; *Mapstrick v. Ramge*, 9 Neb., 393; *Swan v. Saddlemire*, 8 Wend. [N. Y.], 676.

*Munger & Courtright, contra*, contending that the publication is not libelous *per se*, cited: *Townshend, Slander & Libel*, secs. 146-148, 132, 191, 345, 200, 181; *Newbold v. Bradstreet*, 57 Md., 38; *Woodruff v. Bradstreet*, 116 N. Y., 217; *Geisler v. Brown*, 6 Neb., 254; 3 *Sutherland, Damages*, p. 664; *Pittsburgh, A. & M. R. Co. v. McCurdy*, 8 Atl. Rep. [Pa.], 231; *Strader v. Snyder*, 67 Ill., 404; *Johnston v. Morrison*, 21 Pac. Rep. [Ariz.], 465; *Riddle v. State*, 17 S. W. Rep. [Tex.], 1073.

RYAN, C.

On the 17th day of February, 1890, plaintiff filed his amended petition in the district court of Dodge county, in which he alleged that the defendant, unlawfully, maliciously, and wickedly, intending, designing, and contriving how to injure the plaintiff and ruin the plaintiff in his credit and make it impossible for the plaintiff to obtain the necessities of life, and goods, wares, and merchandise on credit from and among the merchants of the city of Fremont and throughout the states of Nebraska, Iowa, and Kansas, did falsely publish and cause it to be believed that the plaintiff, dishonestly and designedly, would not pay obligations legally entered into by him and legally enforceable in the said city of Fremont and throughout said states, with the intent and purpose to coerce and force plaintiff against his will, and in violation, subversion, and in disregard of the laws of the state of Nebraska with respect to the collection and enforcement of money demands claimed by one person against another, to give up and deliver to the defend-

ant \$13.40 of the property of the plaintiff, did theretofore, to-wit, on or about the 1st day of September, 1889, unlawfully, maliciously, wickedly, and secretly combine, confederate, and conspire with divers and numerous persons of the city of Fremont, and also in and through said states, and with them together did maliciously, unlawfully, and wickedly imagine, design, and construct, and did unlawfully, maliciously, and wickedly aid, abet, counsel, and assist in the imagining, designing, and constructing of a certain wicked contrivance known and called "State Abstract of Unsettled Accounts of the Merchants' Retail Commercial Agency of Chicago, and the Retail Merchants' Association of Iowa, Nebraska, and Kansas (Consolidated)," the same being a pamphlet book containing and having therein printed, among other things, the names of sundry and different persons, and secret signs understood and known by the defendant and said persons with said defendant combined as aforesaid, which said secret signs are unknown to plaintiff and plaintiff cannot allege nor describe the same. This amended petition alleged that the known intent, meaning, and signification of said contrivance and book is, that any person whose name is placed, printed, or published therein is unworthy of credit, and does dishonestly and designedly refuse and neglect to pay his debts legally enforceable against him, and it is agreed and made by preconcert among said persons with whom said defendant combined, confederated, and conspired, as aforesaid, a great number of whom are vendors of necessities of life, goods, wares, and merchandise in said city of Fremont, that none of said persons shall sell to any person whose name is placed in said contrivance and pamphlet book any necessities of life, goods, wares, or merchandise of any nature whatsoever on credit, under severe penalty to said persons so combined, conspiring, and confederated, as aforesaid among themselves agreed. The amended petition further alleged that on the first day of September, 1889,

the defendant, intending falsely to cause it to be believed that plaintiff was unworthy of credit and dishonestly and designedly refused to pay his debts and obligations, and to prevent the plaintiff from procuring the necessities of life and goods, wares, and merchandise on credit, for the purpose and with the intent in so doing to unlawfully coerce and compel plaintiff, against his will, and in evasion, subversion, and disregard of the laws of the state of Nebraska relative to the enforcement of debts and obligations, to give up and deliver to said defendant \$13.40 of the property of plaintiff, did unlawfully, maliciously, and wickedly print and publish, and did cause to be printed and published, in the said wicked contrivance and pamphlet book the following wicked, malicious, false, and defamatory libel of and concerning the plaintiff in the words, signs, and figures following, to-wit: "H. W. Masters, Fremont, (note) \$13.40," and did unlawfully, maliciously, and wickedly send, distribute, and circulate said wicked contrivance and pamphlet book with the said words, signs, and figures aforesaid therein printed and placed, and did cause the same to be sent, distributed, and circulated, and did procure, aid, assist, counsel, and encourage the sending, distribution, and circulating of said wicked contrivance and pamphlet book to, among, and between the vendors of the necessities of life, goods, wares, and merchandise, and among other divers good citizens of the city of Fremont and throughout the states of Nebraska, Iowa and Kansas, whereby the said defendant unlawfully, maliciously, and wickedly did publish of and concerning the plaintiff to and among the said vendors and citizens of the city of Fremont and throughout the states aforesaid, that the plaintiff was unworthy of credit, and did and would dishonestly and designedly refuse and neglect to pay his obligations legally enforceable against him, all of which, as published, was understood as aforesaid by said vendors and citizens. The amended petition thereupon averred that by the aforesaid publication

plaintiff had been injured in his credit and good name and brought into scandal and discredit among the vendors of the necessities of life, goods, wares, and merchandise, and many divers good citizens in the said city of Fremont and throughout the said states, and that the credit of plaintiff had been greatly injured, and that plaintiff was thereby prevented from procuring any of the necessities of life, goods, wares, and merchandise from the vendors thereof on credit in said city of Fremont and elsewhere throughout said states, to his great scandal and disgrace, and that he had suffered thereby great anxiety and pain of mind to such an extent that plaintiff was thereby incapacitated from properly performing the duties of his vocation, by all of which the plaintiff had been damaged in the sum of \$2,000, for which he prayed judgment.

In the answer there was a general denial of all the allegations of the petition, except that both the parties, plaintiff and defendant, were citizens of the state of Nebraska, and residents of the city of Fremont. For a second defense it was alleged that on September 1, 1889, plaintiff was and still is indebted to defendant upon a promissory note executed by plaintiff to defendant in the sum of \$13.78, and that the defendant, being desirous of collecting said note (plaintiff having refused to pay the same), on or about the month of June, 1889, sent said note to the Retail Merchants' Agency of Iowa, Nebraska, and Kansas for collection, and said association tried to persuade said plaintiff to pay the amount he was honestly owing to said defendant on said note, but plaintiff refused to pay the same; that on said 1st day of September, 1889, plaintiff was and is owing many and divers other persons various sums which he has and does refuse to pay, and that the general reputation of plaintiff was that he was a person who would fail and refuse to pay his honest debts.

By reply the plaintiff denied each averment of the defendant's answer.

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Upon a trial had of the issues joined, there was a verdict for the defendant, upon which judgment was rendered. From this judgment the plaintiff brings the case to this court for review upon his petition in error.

Upon the trial of this case there was evidence—indeed, it was unquestioned—that defendant held plaintiff's note for something over \$13, which was long past due; that plaintiff had leased property of the wife of the defendant and thereon had made repairs and improvements for which he claimed he should be reimbursed to such an amount as would offset the note which he owed to the defendant. This offset was denied, and thereupon the defendant sent to plaintiff a letter, of which the following are the material parts:

"This association is established to afford protection in giving credit, and is a safeguard against those who contract debts and do not pay or adjust the same. Our members are furnished a list of parties who contract debts and fail to pay or make settlement, each member of the association agreeing to refuse credit to any one whose unsettled account appears on said list until settlement of said claim against him has been made and noted by this association.

"LOCAL BRANCH AT FREMONT, NEB., July 20, 1889.

"*Mr. H. W. Masters, Fremont, Nebraska*—DEAR SIR: We are members of the above association, which, as you will observe, is organized for the purpose of affording protection to retail merchants against that class of persons who have no regard for their promise to pay. Your unsettled account due us now amounts to 13.40 dollars. We shall regret being forced by your neglect to place the account in the hands of the above association for adjustment. Unless you call upon us within ten days from the date hereof and pay the amount due, or pay part of it and arrange for payment of the balance, or give us some reason why you cannot settle it in whole or in part, we shall certainly place the account in the general office of the Retail

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Merchants' Association at Des Moines, Ia., for collection, and after doing so you must not blame us if your credit is stopped in your town, county, and state.

"Hoping to hear from you within the time specified,  
"Yours respectfully, H. J. LEE."

About a month after the receipt by plaintiff of the above letter he received another, having the same letter-heading as that just set out. This last letter was in the following language:

"DES MOINES, IOWA, 8-22, 1889.

"*Mr. H. W. Masters, Fremont, Neb.*—DEAR SIR: We have in our hands for adjustment a claim against you in favor of H. J. Lee of Fremont, amounting to \$13.40. Said firm has several times requested that you in some way make settlement. Can and will you give us a plausible reason why you neglect to do so? Is there anything wrong with the account as presented, and if so, in what particular? We represent an organization of the retail merchants of your town, county, and state, whose sole object is to protect themselves from giving credit to any person who, being indebted to a member of this organization, will not in some way make an effort to honorably adjust such indebtedness. Can you afford to have credit denied you? Will it not be a source of satisfaction for you to have this claim settled? We shall expect a satisfactory adjustment within the next ten days. Notify this office by postal card if you settle the claim. Trusting you will give this your immediate attention and save us the unpleasant duty of proceeding further, we remain

"Yours truly,

"THE RETAIL MERCHANTS' ASSOCIATION,

"Per J. W. MARTIN, *Gen. Secy.*"

In the brief for plaintiff in error there are indications that the letter last referred to was sent to the plaintiff in an envelope upon which was a return card requiring the return of the letter, if not called for in a specified time, to the agency,

which was described as one for the collection of bad debts. We can give no more definite description than this of the said envelope, for it is not to be found in the bill of exceptions and the case must be determined without reference to the alleged envelope. There seems to have been no other correspondence than the above carried on in relation to this claim as between the plaintiff and the defendant or the Merchants' Retail Commercial Association. In the state abstract of unsettled accounts of the agency last named, issued for the month of September and December, respectively, of the year 1889, there appears under the head of Dodge county the following entry: "Masters, H. W., Fremont, (note) \$13.40." It is proper to explain that the note referred to was originally for \$13.78, upon which some interest had accrued, but which by reason of a credit on the note of date May 13, 1885, was reduced to \$13.40. This accounts for the apparent discrepancy in the amounts of the note referred to. The headings of the letters, to which reference has been made, indicate to some extent the object of the organization known as the "Retail Merchants' Association of Nebraska (Iowa and Kansas)." The constitution and by-laws of the organization just referred to were introduced in evidence, and under the head of "membership" the 3d and 4th sections thereof read as follows:

"Sec. 3. It shall be obligatory upon each member promptly to report to the Retail Merchants' Association of Iowa, Nebraska, and Kansas at its general compiling office in Des Moines, Iowa, the name of every person who shall settle his account after being placed in the hands of the association for adjustment.

"Sec. 4. Whenever an account against any person shall have been listed in the abstract of unsettled accounts issued by our general association, or certified to the secretary of this branch by said association as unsettled, no member shall in any case open an account without security with such delinquent, and the opening of such an account by

any member with such person shall be considered a misdemeanor and subject such member to an investigation by the executive board, and if found guilty he shall pay to such board a fine of \$20.00 for the sole use and benefit of this branch, and his neglect or refusal to comply with this demand shall make him liable to expulsion from said association."

There was introduced in evidence a notice, of which the name of the association, the word "penalty" just preceding a copy of section 4, just referred to, which was printed on said notice, and the character and figures "\$20.00" in said section 4 were in very large display type. It was shown by the testimony that this notice, which was of the dimensions of about 14 by 20 inches, was publicly posted in the place of business of some of the members of the Retail Merchants' Association at Fremont, Nebraska. A membership certificate in the Retail Merchants' Association of Iowa, Nebraska, and Kansas was introduced in evidence, from which it appears that a membership fee of \$8 was required as a condition for joining the association, and there was also required the payment of \$1 from each member for each quarterly abstract of unsettled accounts upon deliveries which were to be made in March, June, September, and December of each year respectively. The quarterly abstract for the month of December, 1889, covered 123 pages, either in whole or in part, and on each full page were printed 47 names with notice of the same sort of complimentary character as that which followed the name of the plaintiff in this suit. Following the names printed under the above heading, there were 58 pages devoted to requests for the addresses of the several parties named whose letters had been returned to the Retail Commercial Agency as uncalled for. On the outside of the last page or cover of each quarterly abstract of unsettled accounts of the Retail Merchants' Commercial Agency is given what is probably a correct statement of its main purpose.

It is in the language of section 4 above quoted. If this was not its only object, it certainly was conspicuous as its main object, for it appears in the notices posted in the places of business of the respective members of the association, and upon each quarterly abstract, in such a way as to preclude all possibility of being ignored. This object was to deprive any person whose name should appear as a delinquent in any of the quarterly reports from obtaining credit from a member of the association without his giving security, under a penalty to such member, in case of non-compliance with this condition, of the payment of \$20 and the possibility of his being expelled from the association. To attain this unenviable distinction it was only necessary that any person who claimed to have an account against another should have it listed in the abstract of unsettled accounts issued by the general association, or certified to the secretary of the branch to which he belonged, as unsettled. There was no method provided by which it might be ascertained whether or not the account was just or unjust, whether paid or unpaid, the person reporting the account not even being required to pay any extra expense for the purpose of publishing the name and failure to pay of the alleged delinquent. As indicated in the letter of August 22, 1889, to Mr. Masters, the only way open to him whereby might be avoided the unpleasant publicity given by the quarterly reports was that he should pay or settle the demand made.

The instructions of the court, aside from a mere summary of the issues and the duty of the jury in construing the evidence given, were all devoted to a consideration of the law of libel and the rules with reference to publications which were claimed to be libelous. Of the class last described there were nine instructions given by the court upon its own motion, and four given at the request of the defendant with respect to the same branch of inquiry. It is no part of our purpose to criticise these instructions

so far as they apply to the alleged libelous nature of the transactions complained of, for as to that branch of the case they were probably correct. The court, however, refused an instruction asked by the plaintiff which was in the following language: "If you find from the evidence that the defendant caused the name of plaintiff to be placed in the book to be circulated among the merchants of the city of Fremont and elsewhere in the states of Nebraska, Iowa, and Kansas, to stop the credit of plaintiff and to thereby compel plaintiff to pay to said defendant the sum of \$13.40, and that thereby the credit of plaintiff was injured, then the defendant is liable, and you will find for the plaintiff and assess such damages as the plaintiff has sustained as shown by the testimony." To the refusal to give this instruction a proper exception was taken. In one view of the case, it is perhaps correct to assume that the inquiry was proper as to the alleged libelous nature of the printing and publication, as to which there is no contradiction in the evidence. The petition, however, was not for the recovery of damages arising from the libel alone, it was for the recovery of such damages as should compensate plaintiff for the refusal of dealers in the necessities of life, goods, wares, and merchandise to extend to him such credit as, but for the publications referred to, he would have been accorded.

The case of *Muetz v. Tutuer*, 77 Wis., 236, was one wherein was involved transactions of the same nature in which was concerned as the principal party an agency of the same character and with the same purposes as those of the Retail Merchants' Commercial Agency under consideration in this case. It was there held that the sending of letters with a return card upon the envelope containing the words "for collecting bad debts," was an imputation of dishonesty, and that the distribution of a book among the members with the plaintiff named in the black list of bad creditors constituted a sufficient publication of a libel. That

element, however, is not presented to us for consideration in this case, for the reason that upon that phase there were full and proper instructions to the jury. No qualification seems to have been required as a condition precedent to the right of any one to become a member of the association. For that purpose the only prerequisite was the payment of \$8 or \$10 in advance and the further payment of \$1 for each quarterly abstract as it was issued. This gave to each member the right to report the name of any person against whom such member justly or unjustly claimed to have a demand. The party against whom the claim was made had no right to be heard. His name must be published or he must pay whatever was claimed against him. If his name appeared in the "black list," which is but a proper designation for the so-called "quarterly abstract," his credit was destroyed with every member of the association. The evidence in this case showed that in the city of Fremont, where the plaintiff and defendant both lived, there were from thirty to thirty-two members of the association in question. From the publication of the plaintiff's name in the black list, it resulted that at from thirty to thirty-two different places of business in the city of which he was a resident the proprietors were bound under a penalty to extend no credit to him, no matter what explanation he might give, what defense he might have, or what the real facts of the case might be. As to this there was allowed no opportunity for investigation or adjudication. The law, from considerations of public policy, allows each defendant, the head of a family, certain exemptions. These exemptions are not for the purpose of enabling him to defy his creditors, but are rather deemed proper for the protection of his family. The association in question ruthlessly ignored both the policy and the letter of this law. By it there was allowed to the defendant neither the opportunity to allege and prove a defense nor the right of an impartial trial by jury, and the exemptions as to which the holder of the claim had no right, either equitable

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or legal, were absolutely denied the so-called "defendant." The holder of the claim, by the payment of \$10 in advance and thereafter \$4 annually, became a privileged member of the self-constituted society, which was at once the plaintiff, the judge, the jury, and the executive officer, before which the alleged defendant had not even the poor privilege of being heard. His only recourse was to pay the claim, whatever its nature and whatever might be his just defense. It seems to us that when an individual becomes a member of such an association as this, he should be held as a co-conspirator and not merely as the author of a libel. Counsel for defendant in error insist that the plaintiff in this case has no right to complain, because every man should pay his just debts. Probably this is true, and yet, in a case like that at bar, who is to determine what just debts are due? Manifestly there is no determination of this fact except by the holder of the claim himself. If he shall set in motion such a contrivance as this which we have under consideration, and a damage results to the party whose name he has handed in to be dealt with, he should respond in damages, irrespective of the rules of law governing mere libelous publications. The court erred in refusing to give the instruction asked by the plaintiff in error, and its judgment is therefore

REVERSED.

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THOMAS SWOBE, APPELLEE, v. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, APPELLANT.

FILED MARCH 6, 1894. No. 5546.

1. **Partnership: RETIREMENT OF MEMBER OF FIRM: EFFECT ON CONTRACTS.** The mere fact that a member of a copartnership firm retires therefrom does not release from the obligations of its contract a corporation which had theretofore engaged to furnish

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electric lights for the use of a hotel of which, first, the aforesaid firm, and later its successor, a member of said firm, was proprietor, there being no showing of a release of either member of said firm from its contract liabilities, nor that, under said contract, duties were incumbent on said firm implying a special personal confidence in the member retiring therefrom.

2. **Contracts: RESCISSION.** A party who has required payment of sums of money which by a rescission of the contract will be rendered useless to the other contracting party cannot rescind such contract for the mere non-performance of some condition thereof, unless such right of rescission is reserved by the express terms of the contract itself.

APPEAL from the district court of Douglas county.  
Heard below before HOPEWELL, J.

*Charles Offutt*, for appellant:

The contract was not assignable so as to enable the assignee to require the continuation of the service without the consent of the defendant, and the attempted assignment authorized the defendant to treat the contract as at an end. (*Robson v. Drummond*, 2 Barn. & Ad. [Eng.], 303; *Pomerooy*, Remedies & Remedial Rights, secs. 146, 152; *Humble v. Hunter*, 12 Q. B. [Eng.], 310\*; *Winchester v. Howard*, 97 Mass., 303; *Boston Ice Co. v. Potter*, 123 Mass., 28; *Lansden v. McCarthy*, 45 Mo., 106; *Pollock*, Contracts [4th ed.], 425; *Arkansas Smelting Co. v. Belden*, 127 U. S., 387; *Dickinson v. Calahan*, 19 Pa. St., 233; *Raplye v. Racine Seeder Co.*, 44 N. W. Rep. [Ia.], 363; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575; *Leahy v. Dugdale*, 27 Mo., 439.)

The contract between the electric light company and the firm of Markel & Swobe was terminated absolutely at the dissolution of the latter. Neither the electric light company nor the retiring partner is longer bound thereby. The service to be rendered was the performance of all work of a certain class. It was, moreover, such as could be discontinued at any time without impairing the value of that

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already rendered. (2 Bates, Partnership, sec. 708; *Caldwell v. Stileman*, 1 Rawle [Pa.] 212.)

The general nature of the contract is such as to make it unenforceable after dissolution. (*McCord v. West Feliciana R. Co.*, 3 La. Ann., 285; *Oliver v. Forrester*, 96 Ill., 315; *National Bank v. Hall*, 101 U. S., 43; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575; *Johnson v. Wilcox*, 25 Ind., 182; *Schluter v. Winpenny*, 75 Pa. St., 321; *Johnson v. Hartshorne*, 52 N. Y., 173; *Doe v. Miles*, 1 Starkie [Eng.], 181; *Doe v. Bluck*, 8 C. & P. [Eng.], 464; *In re Beck's Estate*, 24 Pac. Rep. [Ore.], 1038; *Griffiths v. Griffiths*, 2 Hare [Eng.], 588.)

The specific terms of the contract clearly import that it was contingent, and that the parties had in mind its possible, if not probable, discontinuance before the end of the five years. (*Lochrane v. Stewart*, 2 S. W. Rep. [Ky.], 903.)

The defendant had a right to cancel the contract for non-payment of the monthly rentals. (*Withers v. Reynolds*, 2 Barn. & Ad. [Eng.], 882; *State v. Davis*, 20 Atl. Rep. [N. J.], 1080; *Hoare v. Rennie*, 5 Hurl. & N. [Eng.], 19; *Reybold v. Voorhees*, 30 Pa. St., 120.)

In no event did the plaintiff, or, indeed, either one of the partners, have the right to enforce the contract after the dissolution of the firm. (*Thomson v. McDonald*, 10 S. E. Rep. [Ga.], 448; *Tasker v. Shepherd*, 6 Hurl. & N. [Eng.], 575.)

*Edward W. Simeral, contra:*

The action was properly brought by Swobe alone. (*West v. Citizens Ins. Co.*, 27 O. St., 1; *Viles v. Bangs*, 36 Wis., 131.)

The contract was assignable. (*La Rue v. Groezinger*, 84 Cal., 281; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S., 379; *West v. Citizens Ins. Co.*, 27 O. St., 1; *British Waggon Co. v. Lea*, 5 L. R., Q. B. D. [Eng.], 149.)

Swobe succeeded to all the rights of the firm, because he

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was one of the parties with whom the contract was made, and by the assignment no new party or stranger was brought in. (*Ayres v. Chicago, R. I. & P. R. Co.*, 52 Ia., 478; *Dickson v. Indianapolis Cotton Mfg. Co.*, 63 Ind., 9; *Davis v. Lowell*, 77 Ala., 262.)

RYAN, C.

The appellee filed his petition in the district court of Douglas county, alleging that he was the successor of the firm of Markel & Swobe, and that he had become such successor by virtue of his partner, Markel, having on April 4, 1891, sold and transferred to him his interest in the firm of Markel & Swobe, including his rights and interest in the contract with the appellant; that the appellant was a corporation whose business consisted in furnishing electric lights; that said appellant contracted to furnish the firm of Markel & Swobe with electric lights for the Millard Hotel in pursuance of a written contract between said parties, for which payments were to be made as therein stipulated; that said hotel had been doing a large business as such and was constantly using the lights furnished by the appellant under the contract aforesaid in lighting its rooms, and had no other means of sufficiently lighting the same; that notwithstanding the requirements of said written contract the appellant had failed to furnish with good and sufficient light the said hotel, and in the connection last referred to, the appellee attached an itemized statement showing at what times and for how long at each time there had been a failure to furnish light as required by the contract, whereby, as the appellee alleged, he had been compelled to use gas during the several aforesaid failures of the appellant to furnish electric light, and that the gas so used had cost appellee \$1,624.72, as shown by the said itemized statement; that appellee had repeatedly notified appellant of the unsatisfactory supply and quality of the light furnished. The appellee in his petition alleged that he was ready and willing,

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and had been at all times, to comply with each of the terms of the contract referred to, but excused his literal compliance with all of its terms by alleging the above matters and others which are fully stated in the finding of the court hereinafter referred to, and which need not be set out at this time. The appellee tendered the amount which he conceded to be justly due when the aforesaid matters were given proper consideration. He further stated that on April 23, 1891, the appellant had caused to be served upon him a notice, of which a copy will hereinafter be set out at length, and the appellee averred that the appellant, unless restrained, will shut off the light in the aforesaid hotel, to the great and irreparable injury of the appellee, for which the appellee has no just and adequate remedy at law. The prayer of the petition was that the appellant, its servants, employes, and agents, should be enjoined from shutting off said light from said hotel, or from in any way interfering with the same, and for general equitable relief.

The answer alleged the dissolution of the firm of Markel & Swope and its non-existence since April 1, 1891; that said firm during its existence had operated and run the Millard Hotel, but that since the dissolution of said firm the appellee had been running and operating said hotel, and that in said respects, and no other, the appellee was the successor of the firm of Markel & Swope, the said Markel, a member of said firm, having on April 1, 1891, sold and transferred all his right and interest in said firm to appellee Swope. The appellant in its answer admitted that notice had been, on its behalf, served upon the appellee; admitted that appellee had refused to pay what was due from him to appellant, but denied that such refusal was because of the failure by appellant to furnish light as required by the terms of its contract. The appellant, further answering, admitted that unless enjoined or restrained by the court it would shut off said electric light from said hotel, as it had a clear right to do, but denied that the shutting off of said

light would be a great and irreparable injury to appellee for which there would be no remedy at law. The allegations of the petition not admitted as above noted were denied by the answer separately and with great particularity. The answer alleged affirmatively that Markel, who had been a member of the firm of Markel & Swobe, was a man of large wealth and financial credit which was one of the considerations influencing appellant to make the written contract which he did with Markel & Swobe; that from the time the said lighting began, the firm of Markel & Swobe had been unreasonable and unfair in their demands as to light, and had refused to make payments therefor as agreed; that on March 1, 1891, there was due appellant from said firm the sum of \$2,625; that on account of the captious and unreasonable complaints of said firm it was agreed between said firm and appellant that the amount to be paid up to March 1, 1891, should be \$2,073.50, of which there was then paid \$573.50, leaving due appellant the sum of \$1,500, which sum the aforesaid firm had failed and refused to pay, and that afterwards appellant presented its bill for furnishing light for March, 1891, of \$375, which also, as well as said \$1,500, the said firm refused to pay; that thereupon appellant served the notice, referred to in the petition and answer, upon the appellee for the sufficient reasons, as advised by counsel, that appellant was not under obligations longer to furnish light under the aforesaid contract, and could not look to said firm for pay in the future, and because of the failure to pay what was already due appellant at the time of filing its said answer, which payment it was thereby insisted should be made and was an indispensable condition precedent necessary to be complied with before appellee was or could be entitled to any relief whatever.

The contract referred to in the answer and petition was in the following language:

“This agreement, made in duplicate and entered into this

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first day of January, 1890, by and between the New Omaha Thomson-Houston Electric Light Company and J. E. Markel and Thomas Swobe, proprietors of the Millard Hotel, witnesseth: That the said electric light company agrees to sufficiently light said hotel for said Markel & Swobe with five (5) arc and five hundred and thirty-seven (537) sixteen (16) candle power lamps, in a complete and satisfactory manner, for which lighting said Markel & Swobe agree to pay said electric light company the sum of three hundred and seventy-five (375) dollars per month as rent therefor, the same to be paid at the end of each and every month; and the said electric light company hereby guaranties that said five (5) arc and five hundred and thirty-seven (537) lamps will sufficiently light said hotel, but in case said hotel is not sufficiently lighted with said number of lights, then and in that case said electric light company shall furnish additional lights of sixteen (16) candle power, without additional cost to said Markel & Swobe.

“Said Markel & Swobe also agree to the following additional terms: Said electric light company is to furnish and provide all fixtures, work, etc., insulating joints, shell and casing, also concealed work in rooms with decorated ceilings which will not admit of cleated work, for which said Markel & Swobe are to pay in cash, when completed, the sum of three hundred and fifty (350) dollars, and also the sum of five hundred eighty-five (585) dollars for plain work and labor, to be paid as follows, to-wit: If the lights are discontinued at the end of the first year, the sum of \$468, or  $\frac{1}{2}$  off; at the end of the second year, \$351, or  $\frac{1}{2}$  off; at the end of the third year, \$234, or  $\frac{2}{3}$  off; at the end of the fourth year, \$117, or  $\frac{4}{5}$  off; and at the end of the fifth year said Markel & Swobe shall pay nothing. Said Markel & Swobe agree that they will use the lights only when required, the same as gas has been used heretofore in same premises, said lights to be ready for use at all times, day and night.

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"In witness whereof, we have hereunto set our names this first day of February, 1890, at Omaha, Nebraska.

"MARKEL & SWOBE.

"THE NEW OMAHA THOMSON-HOUSTON  
ELECTRIC LIGHT Co.,

"By S. L. WILEY, *Pres't.* .

"In presence of

"J. W. SNOWDEN.

"Attest:

"FRANK WARREN, *Secretary.*"

The notice served by appellant upon appellee was in the following terms:

"OMAHA, NEBRASKA, April 22, 1891.

"*Messrs. Markel & Swobe, Omaha, Nebraska*—DEAR SIRs: That there may be no misunderstanding as to the import of my interview with Mr. Thomas Swobe in my office this P. M., I beg to express herein again the position of the New Omaha Thomson-Houston Electric Light Company, relative to the contract between you and that company for lighting the Millard Hotel in Omaha, Neb., of date February 1, 1890. The New Omaha Thomson-Houston Electric Light Company hereby notifies you that it declares said contract at an end and cancels the same, to take effect on and after May 1, 1891, for the reasons as follows, to-wit: 1. By the terms of said contract it continues only from month to month at the option of either party, and the electric light company now asserts the right to, and does hereby, exercise that option. 2. The firm of Markel & Swobe has been dissolved and is no longer in existence. This contract was made with that firm on the faith of its joint personal credit and financial responsibility. By the dissolution of the firm the contract was assigned, and this without the consent or acquiescence of the electric light company. It hereby, as it has before by word of mouth, refuses to continue the contract with one member of the former firm, or with any assignee of or purchaser

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from said firm. 3. The monthly rental stipulated in the contract, to-wit, \$375, and the price agreed to be paid, to-wit, \$350, for the concealed wiring, has long been in default and remained unpaid, contrary to the express obligation of Markel & Swobe in said contract. The electric light company will continue to furnish the light to and including the 30th of April, 1891, solely for the purpose of completing a full month and to enable you to make such other arrangements as you may deem proper to meet your needs. In compliance with the obligation which the company owes to supply lights to all the public on like terms and for the same price, it hereby notifies you that on and after the first day of May, 1891, it will furnish you with all the lights you may require at its regular list and schedule prices to all other customers, payable at the end of each and every month, and it will be pleased to furnish you at once with a tariff rate on application at its offices in this city. Yours truly,

“NEW OMAHA THOMSON-HOUSTON  
ELECTRIC LIGHT CO.,

“By CHAS. OFFUTT, *Its Attorney.*”

The findings of the court, its conclusions of law, and the relief granted by the final decree, were as follows:

“1. On the 1st day of February, 1890, the defendant entered into a contract with the firm of Markel & Swobe, a copartnership, as set forth in plaintiff's petition.

“2. Said contract was for a term of five years from February 1, 1890, with the option of Markel & Swobe to stop its operation at their election at the end of any year before the end of said term.

“3. Jacob Markel, being the Markel of said Markel & Swobe, before the commencement of this suit, and in April, 1891, assigned to the plaintiff herein all his rights in said firm and the contract with said defendant.

“4. By the terms of said contract, the defendant agreed to sufficiently light said hotel for said Markel & Swobe

with five arc and five hundred and thirty-seven sixteen candle power lamps in a complete and satisfactory manner, or not to exceed six hundred and twelve such lights, and that for said light said Markel & Swope agreed to pay said electric light company the sum of \$375 per month as rent therefor, payable at the end of each and every month.

"5. That at the commencement of this suit and for a long time prior thereto the defendant had furnished five arc and five hundred and thirty-four incandescent lights; that the plaintiff claims said lights were not sufficient and did not light said hotel in a complete and satisfactory manner, and that the plaintiff, before the commencement of this suit, had repeatedly demanded that the said defendant furnish additional incandescent lights as specified in the contract, and that defendant refused to do so.

"6. That prior to the institution of this action, to-wit, March 17, 1891, the firm of Markel & Swope had a settlement with the defendant of the defendant's account and the statement thereof, when it was agreed by and between the defendant and Markel & Swope that the amount due and unpaid by the said Markel & Swope under said contract up to March 1, 1891, was \$2,073.50; that of this amount \$573.50 was paid at or about the time of said settlement; that the defendant on or about the first day of April, 1891, presented a bill to the plaintiff for \$2,225, \$350 thereof being for concealed wiring and \$375 for lights for the month of March, 1891, \$1,500 being the balance due on said settlement; that at the time said bill was presented the plaintiff refused the same, assigning as a reason that the \$350 was included in the settlement had on the 17th day of March, 1891.

"7. That no part of the remainder due on said settlement of March 17, 1891, to-wit, \$1,500, and no part of the rent for March, 1891, was paid before the institution of this suit.

"8. That at the time of the final hearing herein all bills

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for monthly lighting had been paid by the plaintiff, and that on the date of the hearing of the application for the injunction herein the said plaintiff paid the sum of \$1,799.16 thereof to defendant in open court.

"9. That just prior to April 22, 1891, said Markel, of the firm of Markel & Swobe, declined to pay the bill of the defendant when the same was presented, on the ground that he had sold out to the plaintiff Swobe and had nothing more to do with the contract of February 1, 1890.

"10. Said Markel & Swobe, in said contract of February 1, 1890, agreed that they would use the lights only when required, the same as gas had been used theretofore in said premises.

"And thereupon the court concludes, as a matter of law, that the interest of said Jacob E. Markel in said contract of February 1, 1890, was assignable to this plaintiff, and that the plaintiff is now entitled to prosecute this action in his own name and to have the lights furnished by the said defendant under said contract until the expiration of said five years, at his election, in like manner as the said defendant contracted to furnish them to said Markel & Swobe; and it is thereupon ordered and adjudged that the temporary injunction granted herein be, and the same is hereby, made perpetual, and that the said defendant, its servants, officers, agents, and employes be, and they are hereby, enjoined from in any way interfering with the electric lights, wires, and machinery now in said Millard Hotel, in the city of Omaha, Douglas county, Nebraska; provided, however, and this injunction is granted upon the express condition, that the said plaintiff shall pay to said defendant, until the end of said contract, the sum of \$375 on the first day of each and every month as rent for said lights, on the presentation by the defendant of its bill therefor at the Millard Hotel office in the city of Omaha.

"In entering this decree the court does not determine or consider the character or sufficiency of the lights furnished

by defendant, nor undertake to prejudice or estop the plaintiff from prosecuting an action at law for the recovery of the damages, if any, which he may sustain by reason of the failure of the defendant to furnish the lights as contracted for."

Each of the findings of fact is sustained by sufficient evidence to render unnecessary any review thereof with the view of determining the contentions in that direction.

The appellant insists that the contract between appellant and the firm of Markel & Swobe was not assignable. This might be conceded, and yet it would advance but little the inquiry properly arising upon said contract in respect of the relations, rights, and remedies of appellee. The firm of Markel & Swobe was originally one of the parties to the contract under consideration; and the question is not whether or not by virtue of the assignment another party might be substituted, but one member of said firm having retired therefrom and assigned his interest and rights thereunder to his partner, whether or not such partner's entire rights under the contract are extinguished by virtue of said assignment. If the assignment had been by Markel & Swobe to a stranger, it might be insisted, with some degree of plausibility, that a credit was extorted from appellant in favor of a person to whom the appellant might not wish to extend such credit. In the case under consideration, this element has no place. The credit was voluntarily extended to Markel & Swobe. No assignment as between the parties composing said firm could release or even modify the liability of each of the partners of that firm for the indebtedness of the firm, unless assent was given thereto by appellant. It is urged, however, that the contract provided that the firm of Markel & Swobe should use the electric lights only when required, the same as gas had been used on the same premises before the contract was entered into. What was the remedy which the appellant could resort to if more lights were used than required?

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Obviously, it was not in contemplation by either party that upon the use of an unnecessary amount of electric light the company should have the right to deny the hotel the use of any electric light whatsoever. Its remedy, then, was an action on account of such unnecessary use of light as against Markel & Swobe, a right of action in no way abridged by the retirement from that firm of one of its individual members. But it is said that by the terms of the contract it continued from month to month, determinable at the option of either party. The contract, by its terms, required the electric light company to furnish the money for plain work and labor, for which the firm of Markel & Swobe were to make payments as follows: "If the lights were discontinued at the end of the first year, the sum of \$468, or  $\frac{1}{8}$  off; at the end of the second year, \$351, or  $\frac{2}{8}$  off; at the end of the third year, \$234, or  $\frac{3}{8}$  off; at the end of the fourth year, \$117, or  $\frac{4}{8}$  off; at the end of the fifth year said Markel & Swobe shall pay nothing." The oral evidence as to why these terms were fixed upon tends to show that the difficulty of coming to a common understanding was found in this item of \$585, for the appellant declined to wait for this amount, while the firm of Markel & Swobe insisted that if by that firm it was paid in advance the amount would be a total loss in case it was found that the lights were unsatisfactory. It is shown that at the time the contract was entered into the appellant was desirous that the Millard Hotel management should adopt the use of the company's electric lights, and a compromise was agreed upon, its terms being expressed in the language above quoted. The evidence, including the terms of the contract itself, fully justified the court's second finding of fact, that the contract contemplated the term of five years, the firm of Markel & Swobe having the sole option to terminate it within that time. Appellant insists, however, that this option was exercised when Markel retired from the firm of Markel & Swobe, for, says appellant's counsel in his

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brief, "there could be no better evidence of the exercise of this option to discontinue than Markel's withdrawal from the firm and his refusal to pay the rents, saying that he had nothing further to do with the hotel business." The language thus attributed to Markel is paraphrased by appellant's counsel as follows: "Here, in words not to be mistaken, he [Markel] gave the defendant [the appellant] notice that, so far as he was concerned, the lights were not needed and were not to be furnished." If the statement of Markel was fairly susceptible of the construction given it in the use of the words, "and were not to be furnished," there would be force in appellant's argument, for it might amount to a rescission of the contract and the repudiation of all rights and liabilities under it; but it is in just this respect that appellant's contention fails, for Markel never was released from liability for the performance of the terms agreed to by Markel & Swobe, either by his refusal to perform or otherwise, so far as the evidence discloses. The proposition to enter into a new contract with appellee, which is found at the close of appellant's notice, though addressed to Markel & Swobe, clearly indicates that there is, in reality, no objection to Mr. Swobe himself, nor to his ability to perform the undertakings in the existing contract. A notice of rescission by one party because of an objection to the financial ability of the other to pay what has already been undertaken, is, to say the least, somewhat inconsistent with a contemporaneous proposition to renew such undertakings upon terms which require still greater financial ability of the party notified. The judgment of the district court is right and is

**AFFIRMED.**

JOHN D. SLADE, APPELLANT, v. SWEDEBURG ELEVATOR  
COMPANY, APPELLEE.

FILED MARCH 6, 1894. No. 5695.

1. **Accord and Satisfaction.** A compromise of honest differences, whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him.
2. **Review: EVIDENCE OF COMPROMISE.** Where there is sufficient evidence to justify a finding that there has been an executed compromise of all differences between the parties to the action, the judgment of the trial court will not be reversed.

APPEAL from the district court of Saunders county.  
Heard below before BATES, J.

*Abbott, Selleck & Lane*, for appellant:

In cases of contract for the payment of a sum of money the payment of a less sum will not be a good satisfaction unless it was paid before due, or upon some other new and valid consideration. (2 Greenleaf, Evidence, sec. 28; Bishop, Contracts, sec. 50; *Price v. Treat*, 29 Neb., 544; *Abbott v. Royce*, 3 N. Y. Supp., 503; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn., 229.)

*Simpson & Sornborger, contra*, cited: *Pulliam v. Taylor*, 50 Miss., 257; *Bull v. Bull*, 43 Conn., 465; *Preston v. Grant*, 34 Vt., 203.

RYAN, C.

This action was brought by the appellant in the district court of Saunders county, Nebraska, to enforce a claim for a balance alleged to be due from appellee to appellant for constructing its elevator. The contract for the erection was oral, and, as would naturally be expected, there exists a conflict of evidence as to its terms and conditions. The

answer alleged that the elevator was very defectively constructed, and that it was not completed as agreed, and that, therefore, the elevator company refused to pay the amount to which appellant would have been entitled upon full compliance with the terms of the aforesaid contract; that to settle the differences it was agreed finally that appellant should be paid the sum of \$350 in full of his claim against appellee, which proposition was assented to by appellant, whereupon that sum was paid by appellee to appellant, and that there was nothing due when this action was begun. This was denied by a reply duly filed.

The evidence was not at all satisfactory as to anything connected with the building of the elevator, and as to the alleged final settlement it is but little better. There was, however, sufficient relevant evidence from which the court might conclude that there had been made a compromise of honest differences between these contracting parties, and that pursuant to the terms of such compromise all matters of difference had been fully settled. The judgment of the district court is therefore

AFFIRMED.

OMAHA STREET RAILWAY COMPANY V. MARGARET CRAIG.

FILED MARCH 6, 1894. No. 5519.

1. **Negligence: QUESTION OF LAW.** When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court. *Grand Trunk R. Co. v. Ives*, 144 U. S., 408, and authorities in support of this rule, collated in opinion, followed.

39	601
39	802
39	601
40	36
40	616
140	891
39	601
42	581
43	301
143	727
39	601
44	860
39	601
45	407
39	601
47	96
48	69
48	460
48	642

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2. **Carriers: NEGLIGENCE.** Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.
3. **Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.**
4. **Street Railways: PERSONAL INJURIES: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE: REVIEW OF EVIDENCE.** Plaintiff sued the defendant, a street railway company, for damages for injuries she alleged she sustained through the negligence of defendant's servants while a passenger on its cars. The car on which plaintiff rode was an open one, having seats crosswise, and on either side a platform on which persons stepped in entering or leaving the car. At the end of each seat was an upright provided with a hand-hold. Plaintiff testified that on entering the car she informed the conductor that she wished to alight at Cass street, to which he answered, "Yes, ma'am;" that when the car reached Cass street crossing she rang the bell, the gripman applied the brake and brought the car almost to a standstill; that thinking it would stop every instant, without using the hand-hold, she stepped onto the platform preparatory to stepping onto the street when the car came to a full stop, and while in that position and seen by the gripman, he released the brake and suddenly accelerated the car's speed with a jerk, which threw plaintiff onto the street. *Held*, (1) Whether plaintiff was guilty of contributory negligence in stepping onto the platform of the car while in motion, and in not using the hand-holds on the uprights, were questions of fact for the jury; (2) that the jury's finding that plaintiff was thrown from the platform by the cause and in the manner she testified, would not be set aside as not supported by the evidence because two witnesses testified that she stepped from the platform onto the street, nor because two witnesses swore there was no sudden acceleration of the speed of the car, and three witnesses swore that they did not observe any.
5. **Conflicting Evidence: REVIEW.** This court will not weigh conflicting evidence nor pass judgment upon the credibility of witnesses.
6. **Instructions.** Certain instructions given by the trial court to the jury set out in the opinion and approved.
7. **Negligence: INSTRUCTIONS.** Such expressions as "alight neg-

ligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language.

8. **JURORS: QUALIFICATIONS.** To qualify a person to act as a juror he should not only be unbiased and unprejudiced against all parties to the suit, but he should stand indifferent as to the success of either party thereto; and a person called as a juror who testifies that his acquaintance with one of the parties will interfere with his judgment and finding in the case should be excused.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

The facts appear in the opinion.

*John L. Webster*, for plaintiff in error:

It is negligence to leap from a moving street car. (*Hagan v. Philadelphia & G. F. R. Co.*, 15 Phila. [Pa.], 278.)

If passenger signaled the car to stop and the car immediately began to slow down speed, and the passenger, without waiting for the car to stop, did step from the car while in motion and was injured, he cannot recover. (*Harmon v. Washington & G. R. Co.*, 6 Mackey [D. C.], 64.)

A passenger in the act of stepping down from the front platform of a street car, and when his foot was nearly on the ground the driver let go the brake and the car started, and he was thrown down and injured, cannot recover. (*Brown v. Congress & Baker Street R. Co.*, 49 Mich., 153.)

The boarding or alighting from a moving train is presumably and generally a negligent act *per se*. It is not sufficient to rebut the presumption of negligence that the trainmen acquiesced in the action of the passenger, or that the company failed to stop at the appointed place. (*Solomon v. Manhattan R. Co.*, 103 N. Y., 437.)

Where one is injured by attempting to get off a moving street car, unless some act of negligence on the part of the

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company or its servants producing the injury is shown, it is not error to enter a nonsuit. (*Stager v. Ridge Avenue P. R. Co.*, 119 Pa. St., 70.)

In a case where it appeared a person attempted to board a street car while in motion, and that his foot slipped from the step caused by a jolt of the car, nonsuit was properly entered. (*Reddington v. Philadelphia Traction Co.*, 132 Pa. St., 154.)

To alight from a moving street car without notice to the person in charge forbids recovery, though the injury resulted from the sudden starting of the car. (*Nickols v. Middlesex R. Co.*, 106 Mass., 465.)

To alight after ringing bell to stop, and failure of car to stop, but only slackened speed, is not justified. (*West End & Atlantic Street R. Co. v. Mozely*, 79 Ga., 463.)

The fact that the train is about to pass the place of the passenger's destination without stopping will not justify him in jumping from the train. (*Reibel v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind., 476.)

In alighting from a moving train, it is not sufficient to prove that a prudent person would have done the same thing under the same circumstances, but it must always be made to appear that the company did some act or was guilty of some negligence which contributed to the injury. (*Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex., 568.)

It is contributory negligence to jump from a moving train just before it has stopped, but while train is being brought to a stop. (*Savannah, F. & W. R. Co. v. Watts*, 82 Ga., 229.)

Where conductor promised to let passenger off, not at a station but at a street crossing, and then neglected to stop at the street crossing, and passenger got off while train was in motion, no recovery can be had in suit for damages for injury sustained. (*Watson v. Georgia Pacific R. Co.*, 81 Ga., 476.)

It is negligence for a passenger to jump from a railroad

train moving from six to twelve miles an hour, although the conductor advised him that it was safe. (*Bardwell v. Mobile & O. R. Co.*, 63 Miss., 574; *Chicago & A. R. Co. v. Randolph*, 53 Ill., 510; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Dowell v. Vicksburg*, 61 Miss., 579; *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich., 470; *Burrows v. Erie R. Co.*, 63 N. Y., 556; *Morrison v. Erie R. Co.*, 56 N. Y., 302; *Vimont v. Chicago & N. R. Co.*, 71 Ia., 58; *Missouri P. R. Co. v. Texas & P. R. Co.*, 36 Fed. Rep., 879.)

Attempting to board a train running six miles an hour is negligence *per se*, even though conductor told man to jump on. (*Hunter v. Cooperstown & S. V. R. Co.*, 2 L. R. A. [N. Y.], 832.)

The residents of a municipality must be held to know the rule as to the place of stopping of trains of street cars prescribed by the ordinances of the city. (*North Birmingham Street R. Co. v. Calderwood*, 7 So. Rep. [Ala.], 360.)

The ninth instruction was erroneous. The rule is that if the plaintiff was guilty of contributory negligence, or, in other words, guilty of negligence contributing to the injury, then the plaintiff cannot recover. (*Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St., 91; *New Jersey Express Co. v. Nichols*, 33 N. J. Law, 434; *Wilds v. Hudson River R. Co.*, 24 N. Y., 430; *Toledo & W. R. Co. v. Goddard*, 25 Ind., 185; *Baltimore & O. R. Co. v. State*, 60 Md., 449.) In Illinois an exception to this rule exists to the extent and with the limitation that if the plaintiff's negligence is slight and the defendant's negligence in comparison should be gross, then such slight negligence of plaintiff will not prevent recovery. (*Chicago, B. & Q. R. Co. v. Lee*, 60 Ill., 501; *Illinois C. R. Co. v. Hammer*, 85 Ill., 526; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill., 425; *Chicago & A. R. Co. v. Langley*, 2 Ill. App., 505; *North Chicago Rolling Mills Co. v. Monka*, 4 Ill. App., 664; *City of Winchester v. Case*, 5 Ill. App., 486; *Pittsburgh, C. & St. L. R. Co.*

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*v. Shannon*, 11 Ill. App., 222; *Peoria, D. & E. R. Co. v. Miller*, 11 Ill. App., 375; *Moody v. Peterson*, 11 Ill. App., 180; *Union Railway & T. Co. v. Kallaher*, 12 Ill. App., 400.) The supreme court of Nebraska has decided the question to the effect that if plaintiff's slight negligence, if any, contributed directly to the alleged injury, the verdict should be for the defendant. (*City of Lincoln v. Gillilan*, 18 Neb., 114.)

*Cowin & McHugh, contra:*

We maintain that the following propositions cannot be successfully controverted: (1.) The same degree of care and caution is not required of a person in getting on or off a street railway car as is required in getting on or off a steam railway car. (2.) The plaintiff, Miss Craig, was not guilty of negligence, when she found the car nearly at a dead still, in rising from her seat and putting one foot upon the side board step, ready to step off when the car should completely stop. (3.) If Miss Craig was guilty of negligence in rising from her seat, under the circumstances, and putting one foot upon the side board, ready to step off when the car should cease to move, yet, if the gripman saw her in that position and, instead of entirely stopping the car, propelled it forward, which caused more or less of a jerk, by reason of which she was thrown and injured, she is entitled to recover. (4.) If the conductor and gripman, one or both, knew that a passenger was to alight at Cass street and, in addition to that, the bell was rung for a stop, and that when the car nearly came to a stop, barely moving, Miss Craig arose from her seat, took a step with one foot upon the side board, ready to step with the other immediately after the car should cease moving, and the car suddenly started forward, before entirely stopping and giving her an opportunity to get off, and that such forward movement caused her to be thrown to the ground and injured, then she is entitled to recover, whether the gripman and

conductor, or either, saw her in her standing position or not, for the reason that it was their, or one of their duties to see that the car came to a full stop, and that the passenger had alighted before accelerating the speed of or propelling forward the car. (5.) It is not *prima facie* evidence of negligence to get on or off even a steam passenger train, much less a street car, while the train is moving at a speed of four or five miles an hour. (*Louisville & N. R. Co. v. Crunk*, 21 N. E. Rep. [Ind.], 31; *Birmingham U. R. Co. v. Smith*, 8 So. Rep. [Ala.], 86; *Evansville & C. R. Co. v. Duncan*, 28 Ind., 441; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind., 48; *Montgomery & E. R. Co. v. Stewart*, 8 So. Rep. [Ala.], 708; *Union P. R. Co. v. Mertes*, 35 Neb., 204; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551; *New York, P. & N. R. Co. v. Coulbourn*, 16 Atl. Rep. [Md.], 208; *Lacas v. Detroit City R. Co.*, 52 N. W. Rep. [Mich.], 745; *Britton v. Grand Rapids Street R. Co.*, 51 N. W. Rep. [Mich.], 277; *Beems v. Chicago, R. I. & P. R. Co.*, 12 N. W. Rep. [Ia.], 223; *Bowie v. Greenville Street R. Co.*, 10 So. Rep. [Miss.], 574; *Central Railroad & Banking Co. v. Miles*, 6 So. Rep. [Ala.], 696; *Ridenhour v. Kansas City Cable R. Co.*, 13 S. W. Rep. [Mo.], 889; *Houston v. Gate City Street R. Co.*, 15 S. E. Rep. [Ga.], 323; *Gallagher v. West End Street R. Co.*, 30 N. E. Rep. [Mass.], 480; *Buck v. People's Street R. & E. L. & P. Co.*, 18 S. W. Rep. [Mo.], 1090; *Lent v. New York C. & H. R. R. Co.*, 24 N. E. Rep. [N. Y.], 653; *Hays v. Gainesville Street R. Co.*, 8 S. W. Rep. [Tex.], 491; *Strand v. Chicago & W. M. R. Co.*, 31 N. W. Rep. [Mich.], 184.)

The following cases are cited in support of the ninth instruction: *Orleans Village v. Perry*, 24 Neb., 831; *Lake Shore & M. S. R. Co. v. Johnson*, 26 N. E. Rep. [Ill.], 510; *Terre Haute & I. R. Co. v. Voelker*, 22 N. E. Rep. [Ill.], 20.

RAGAN, C.

Miss Margaret Craig brought this suit in the district court of Douglas county against the Omaha Street Railway Company (hereinafter called the "company") to recover damages for a personal injury which she alleges she sustained by reason of the company's negligence while she was a passenger on its cars on September 22, 1889. The defenses of the company were a general denial, and contributory negligence on the part of Miss Craig. There was a finding and judgment for Miss Craig, and the company prosecutes error.

The car on which Miss Craig was a passenger was the last of a train of two cars moved by an endless cable. The rear car was an open or summer car, having seats across the same, and on either side a foot-board upon which passengers stepped on entering or leaving the car. At the end of each seat there were uprights with hand-holds attached. The train was in charge of a conductor and gripman. Miss Craig boarded the train at the intersection of Dodge and Twentieth streets in the city of Omaha, and occupied the rear seat. The train was moving north on said Twentieth street, and Miss Craig was to alight at the intersection of Twentieth and Cass streets and on the north side of the latter. It was the rule or custom of the company to stop its Twentieth street cable cars just on the north side of said Cass street. Miss Craig's evidence of the casualty was substantially as follows:

A. Well, when he came to collect the fare at Davenport street I told him to stop at Cass street; he answered, "Yes, ma'am," and when the car was crossing Cass street I noticed they wasn't going to stop and I rang the bell and sat back in the seat and waited for quite a little while; and finally they slowed up the car and it didn't—and they slowed up the car and it was going very slow, and I looked at the gripman to see if he was going to bring the car to a stand-

still, and he looked back at me—it was moving very slow—and then I took the step to step off.

Q. Where did you take the step? Onto what? This rail?

A. On that side rail; yes, sir.

Q. When you took the step—when you put your foot out and took that step onto the east rail for the purpose of stepping off, what was the motion of that car then?

A. O, you could tell it was just slowly moving. You would think it would stop in a second. Instead, when I went to take my last step, why he let the brake off, and the car started forward with a sudden jerk, and that jerk threw me.

Q. When you arose up to step on the rail, how near had the car stopped?

A. Well, it was just moving along very slowly. It was not—it hadn't come to a standstill—stopped altogether, but it was moving. You would think it would stop at any time, and I waited quite a little after I raised from the seat to give him plenty of time to bring the car to a stop.

Q. When you were on this rail, ready to step off one step, was the gripman looking at you?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir. He looked around to see, I had an idea, if I got off or was going to get off.

Q. But when you were there, and it was going slow, was he looking at you when you were there on the rail ready to step off?

A. Yes, sir. He turned and looked at me the second, time before I got off.

Q. And then the car jerked ahead?

A. Yes, sir.

Cross-examination:

Q. But the train had not got quite to a full stop when you did step off?

A. Well, I had not yet stepped.

Q. So from the seat that you were sitting in, if you wanted to alight from that car, the first thing you would do would be to put your foot out on this foot-board that ran along the side of the car?

A. Well, I didn't do that.

Q. Well, I am not asking you how you did it. Isn't that the first thing you would step onto? Would it be the platform?

A. Well, I would raise out of the seat. I would stand in a straight standing position first, before I would attempt to step down.

Q. Now, why did you not wait till the car had come to a full stop?

A. Why, the car was moving so slow that you would think it would stop every instant, and it was merely moving, and I had stepped down onto the side rail or foot-board, and thought all the time I would step, and I took that step onto the foot-board, thinking that the car would be stopped; and in place of coming to a real standstill, stopping perfectly still, it gave a sudden jerk forward, and that jerk had thrown me off of that foot-board.

Q. Why didn't you wait until the car had come to a full stop before you stepped out on that foot-board?

A. Well, the car was moving so slow and the gripman looked. I noticed the gripman twice to see if he was going to bring it to a stop, and he looked back twice to see if I had got off; and it was moving so slow that I thought it would be stopped all the time, and I would step onto that foot-board; and it didn't; it went on; and if it had moved at the rate it was going then, I could have stepped off in perfect safety; but that sudden jerk threw me.

Q. So you assumed, or thought you could step down with safety off the car, if the car maintained simply the motion it then had?

A. Well, I wasn't going to try it.

Q. Well, but if you had grabbed hold of that [the post] you would not have fallen, would you?

A. Well, I would with the jerk the car had taken.

Q. You think you would anyhow?

A. Yes, sir; it jerked forward very suddenly.

Q. Now, you say after you had got onto that foot-board that the car made a jerk?

A. Yes, sir.

Q. That is the way you think it was?

A. Yes, sir.

Q. When you got onto that foot-board, which way were you looking?

A. Well, I glanced at the gripman just as soon as I took the step down on the foot-board, for I thought every second the car would come to a standstill.

Q. And you didn't know at the time of this accident any more about it than you know?

A. Well, I know that he let the car go forward when he hadn't ought to——

Q. You think that you didn't step from that foot-board onto the ground? Is that correct?

A. That I didn't step?

Q. Yes.

A. Why, no; I didn't. I didn't step. The car jerked forward and threw me before I had time to step.

Q. Then you didn't step from the platform onto the ground?

A. No, sir.

This testimony is contradicted by the witnesses for the company. One Thompson, a passenger on the train, testified that as near as he could see from where he was standing, Miss Craig arose and turned and stepped right out on the foot-board (platform) and after that right out on the street; that at that time the car was not moving much faster than a person could walk and came to a stop within a car's length of the point where Miss Craig stepped off, and that

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he did not notice any sudden jerking of the car. One Benton testified that Miss Craig stepped onto the platform and then onto the street before the car stopped, and that there was no sudden jerking of the car. The gripman and conductor testified that there was no sudden jerking of the car. This evidence on the part of the company was somewhat weakened and contradicted by cross-examination and certain facts and circumstances proved on the trial. This evidence tended to establish the following conclusions: That Miss Craig notified the conductor where she was to alight; that as the car was on the Cass street crossing Miss Craig rang the bell for the train to stop; that the gripman applied the brakes and brought the train nearly to a standstill just beyond the crossing; that when the car was nearly stopped Miss Craig stepped out on the platform intending to step to the street when the train should become motionless; that the gripman saw her in that position, and instead of bringing the train to a standstill he took off the brakes, which caused the speed of the train to be accelerated, and that this sudden jerk threw Miss Craig from the platform onto the street; and that she did not step from the platform onto the street.

Counsel for the company says that this evidence discloses no negligence on the part of his client. The negligence charged to the company was releasing the brake and gripping the car to the cable, and thus accelerating the speed of the car, instead of stopping it while Miss Craig, to the knowledge of the company's servants in charge of the train, was standing on the platform, the car having been slowed down, expecting the train to come to a full stop and intending to alight when it should do so. Whether the company's servants were guilty of the negligence charged was a question properly submitted to the jury. We cannot set aside the jury's finding because the evidence on which it was based was contradictory. The credibility of witnesses and weight to be given their state-

ments were for the jury, not for us. This court has many times said that it would not weigh conflicting evidence nor pass judgment on the credibility of witnesses.

At the request of the company the trial court instructed the jury as follows:

“The burden rests upon the plaintiff to prove that there was a sudden starting of the car. Upon this point you have the testimony of five witnesses for the defendant; two of them the train men, and three not employes of the company. If these witnesses had an equal opportunity to know whether there was or was not a sudden jerking of the car, and if entitled to equal credit, then the plaintiff has failed to produce a preponderance of testimony on this point.” The giving of such an instruction as this is of doubtful propriety; and it does not follow that because five persons had an equal opportunity to observe an occurrence which one person says happened, and the other five say they did not observe, that therefore the occurrence did not happen. The jury may have been of the opinion that it was more probable that Miss Craig fell from the platform of the car, as she says she did, and that the other witnesses, by reason of their situation at the time, did not notice the accelerated speed of the car, than that Miss Craig deliberately committed perjury. At all events the company has had the benefit of having its theory of the casualty not only submitted to the jury, but had their attention specifically directed by the instruction of the court in such manner as to leave no doubt but that the jury’s finding must be taken to mean that Miss Craig’s version of the accident was the correct one.

Counsel for the company next contends that because Miss Craig did not wait for the car to come to a full stop before she stepped onto the platform, and because, when she stepped onto the platform, she did not avail herself of the hand-holds on the uprights at the end of the seats, that she was, therefore, guilty of contributory negligence, and

asks us to say as a matter of law that this act and omission of Miss Craig raise against her a conclusive presumption of negligence. But we think that Miss Craig's stepping out onto the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand-holds on the uprights of the seats were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act and omission of Miss Craig were, under the circumstances, negligence, and therefore it was for the jury to say whether the evidence of what she did and what she omitted to do warranted the conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence. This is the settled rule and doctrine of this court, and has been many times announced, as will be seen from the following cases: *Huff v. Ames*, 16 Neb., 139; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *City of Lincoln v. Gililan*, 18 Neb., 114; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Powers v. Craig*, 22 Neb., 621; *Orleans Village v. Perry*, 24 Neb., 831; *Union P. R. Co. v. Lee Sue*, 25 Neb., 772; *Stevens v. Howe*, 28 Neb., 547; *Omaha & R. V. R. Co. v. Clark*, 35 Neb., 867; *Chicago, B. & Q. R. Co. Landauer*, 36 Neb., 642; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Union P. R. Co. v. Porter*, 38 Neb., 226.) The rule is, we think, just and reasonable, and in harmony with the genius of our institutions and the weight of modern judicial authority. (*Louisville & N. R. Co. v. Crunk*, 21 N. E. Rep. [Ind.], 31; *New York, P. & N. R. Co. v. Coulbourn*, 16 Atl. Rep. [Md.], 208; *Cumberland Valley R. Co. v. Maugans*, 61 Md., 53; *Britton v. Street R. Co.*, *Grand Rapids*, 51 N. W. Rep. [Mich.], 276; *Lacas v. Detroit*

*City R.*, 52 N. W. Rep. [Mich.], 745; *Strand v. Chicago & W. M. R. Co.*, 31 N. W. Rep. [Mich.], 184; *Beems v. Chicago, R. I. & P. R. Co.*, 58 Ia., 150; *Bowie v. Greenville Street R. Co.*, 10 So. Rep. [Miss.], 574; *Ridenhour v. Kansas City Cable R. Co.*, 13 S. W. Rep. [Mo.], 889; *Buck v. People's Street R.*, 8 S. W. Rep. [Mo.], 1090; *Lent v. New York C. & H. R. R. Co.*, 24 N. E. Rep. [N. Y.], 653; *Central Passenger R. Co. v. Stevens*, 22 S. W. Rep. [Ky.], 312; *Connolly v. City of Waltham*, 31 N. E. Rep. [Mass.], 302; *Finnegan v. Fall River Gas Works Co.*, 34 N. E. Rep. [Mass.], 523; *Washington & G. R. Co. v. Harmon*, 147 U. S., 571; *Hobbs v. Chicago Sugar Refining Co.*, 44 Ill. App., 418; *Arkansas Telephone Co. v. Ratteree*, 21 S. W. Rep. [Ark.], 1050; *Brown v. Brooks*, 55 N. W. Rep. [Wis.], 395; *Thompson v. Flint & P. M. R. Co.* 57 Mich., 300; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass., 208; *Marietta & C. R. Co. v. Picksley*, 24 O. St., 654; *Jamison v. San Jose & St. C. R. Co.*, 55 Cal., 593.) This rule has received the sanction of the supreme court of the United States. The *Grand Trunk R. Co. v. Ives*, 144 U. S., 408, was a suit brought by the administrator of one Smith for damages for his death alleged to have been caused by the negligence of the railway company. Smith was traveling on the highway which crossed the Grand Trunk Railway Company's road at grade. At the place of the crossing a view of the track was obstructed until a person approaching the same was within fifteen or twenty feet of it. Smith and his wife were driving down the highway in a buggy with the top raised, and just as they reached the point where the railway crossed the highway they were struck by an engine and Smith was killed. It appears that the defense relied upon was that Smith was guilty of contributory negligence, in that he drove onto this railway track, the view of which was obstructed, without stopping and first ascertaining if there was a train approaching. The circuit court of the United States for the district of

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Michigan instructed the jury as follows: "You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard, and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject." This instruction was excepted to, and on appeal to the United States supreme court it was declared to be correct law and applicable to the facts brought out at the trial of the case. The court said: "Negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation; or, doing what reasonable and prudent persons under the existing circumstances would not have done." The court further say in this connection: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. \* \*

What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to know the special circumstances and surroundings of each particular case and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs." And the court declared the rule to be: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever

considered as one of law for the court." This rule has been again examined and approved by the supreme court of the United States as late as November, 1893, in the case of *Gardner v. Michigan Central R. Co.*, 150 U. S., 349.

Counsel for the company cites us to authorities holding that as a matter of law it is negligence for one to step on or off a street car in motion. Such are *Hagan v. Philadelphia & G. F. R. Co.*, 15 Phila. [Pa.], 278; *Harmon v. Washington & G. R. Co.*, 6 Mackey [D. C.], 64; *Stager v. Ridge A. P. R. Co.*, 119 Pa. St., 70; *Reddington v. Philadelphia Traction Co.*, 132 Pa. St., 154. The cases cited hold as counsel contends, but it must suffice to say that they do not hold the rule of this court.

The next error alleged by the company is the giving by the trial court to the jury instructions Nos. 6 and 9. They are as follows:

"No. 6. The plaintiff, in order to recover in this action, must not only satisfy you by the evidence that she received the injuries complained of, but that the same were occasioned by the negligent act of the defendant, or its agents, on the occasion set forth in the petition. Negligence has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;' it is 'want of due diligence, whether the party at fault is an individual, a private corporation, or a municipality.'

"No. 9. You are instructed that if you find from the evidence that plaintiff, at the time of the injury complained of, was guilty of slight negligence in attempting to leave the car while in motion, at the speed above mentioned, and that such slight negligence contributed to the injury, still such fact, if you find it to be a fact, would not of itself prevent a recovery in this action, and the plaintiff is barred from recovering damages only when the injury

could have been avoided by the exercise of ordinary or reasonable care upon her part. Such negligence on the part of the plaintiff, if you find any to have existed, must be found to have contributed to bring about the injury complained of in order to defeat a recovery in this case."

The complaint made of the sixth instruction is that it omits the element of contributory negligence on the part of the plaintiff; and that the ninth instruction is bad because it asserts that if the jury should find Miss Craig was guilty of slight negligence contributing to her injury it would not prevent her recovery; but we do not think that the company was prejudiced by the giving of either of these instructions. The court had just told the jury in the eighth instruction that if they should find from the evidence that Miss Craig attempted to step from the train while the same was in motion, and that such act was a dangerous one and one liable to result in injury, and that she was heedless, careless, and negligent in stepping from the train, and that her injuries were occasioned by such act and not by the negligence of the company, then she could not recover; and that if the jury found Miss Craig had been guilty of contributory negligence, it would bar her right to recover, unless they found that the company had been grossly and wilfully negligent. In drafting the ninth instruction the learned judge probably had in mind certain instructions given by the trial court and commented on by this court in *City of Lincoln v. Gillilan*, 18 Neb., 114, and *Orleans Village v. Perry*, 24 Neb., 831, where such terms as "slight negligence" and "slight want of ordinary care" were used. It is unfortunate that such expressions have ever been used in instructions to juries, as they tend to obscure and confuse what should be stated in plain and concise language. Negligence does not cease to be negligence because qualified as "slight," nor because denominated "slight want of ordinary care." While instruction No. 9 was erroneous as above stated, we are constrained to say that when all the

instructions of the court are considered together, the company was not prejudiced by the error in said instruction.

The next complaint of the company is that the court erred in giving instruction No. 12 on its own motion, and instruction No. 1 at the request of Miss Craig. The instructions are as follows:

"12. If you find from the evidence that before the injuries complained of were received, plaintiff notified the conductor of the train that she desired to leave the same at Cass street, that the conductor notified the gripman of this fact, and you find that while crossing Cass street, the defendant let go the cable and put on the wheel brake, and slowed down so that after arriving on the straight track, north of the north line of Cass street, said train was then moving at a rate of from two to three miles per hour; and if you find from the evidence that plaintiff then arose and stepped on the platform as if to descend from the car, that the gripman turned once or twice to observe her; and if you further find that about this time, or before plaintiff left her position, the gripman suddenly let off the brake and permitted the car to start with a sudden jerk, by reason whereof plaintiff was violently thrown to the ground and received the injuries complained of; and if you find that at the time the plaintiff arose to get off the car she had reasonable ground to believe that the car was about to stop, and that her position did not contribute to her fall and injuries, that the defendant would be liable to plaintiff in such sum as the evidence shows you she sustained, not exceeding the amount claimed in the petition, unless you further find from the evidence that plaintiff could not by the exercise of due care have avoided the consequence of the negligent act of the defendant, if you find it was so negligent, and if you find such to be the facts."

"1. If you, gentlemen of the jury, find from the testimony in this case that the plaintiff Margaret Craig was a passenger on the defendant's cars at the time alleged in the

petition, that the servants of the company in charge of those cars knew at what point she desired to alight, she was entitled to be carried by the defendant company with proper and reasonable care to the place where she desired to alight, and to have the cars stop at that point a sufficient length of time to permit her to alight with reasonable care and diligence; and if you further find from the testimony that when the defendant's cars reached that point they had commenced slowing up but did not stop, but passed beyond such point and then continued to slow up, and while going very slow, as if to immediately stop, the plaintiff, Miss Craig, arose from her seat and stepped upon the platform or guard on the side of the car, which platform or guard was used for alighting from the car, and that as she stepped on that platform or guard for the purpose of alighting when the car should stop, the gripman propelling the car saw her and moved the cars suddenly forward with a jerk before stopping them and giving Miss Craig, the plaintiff, an opportunity to alight, and that by such sudden movement forward she was thrown to the ground and injured, and that she herself was free from blame under all the circumstances of the case, then your verdict should be in favor of the plaintiff."

The complaint made of these instructions is that they fail to state what would have constituted contributory negligence on Miss Craig's part; but we are of the opinion that the instructions were correct in every particular. As has been stated above, it was not for the court to say what acts or omissions of Miss Craig rendered her guilty of contributory negligence. That was for the jury. Another error assigned by the company is the refusal of the trial court to give instructions Nos. 9, 12, and 16, requested by the company. They are as follows:

"16. The jury are instructed that, under the evidence of this case, there is not sufficient proof of any act on the part of the defendant company, or its agents or servants, to jus-

tify a recovery herein, and you are instructed to return a verdict for the defendant."

"9. The jury are instructed that it is presumably a negligent act for a passenger to attempt to alight from a cable train while the same is in motion and that it is not sufficient, to rebut this presumption of negligence on the part of the plaintiff, that the men in charge of the car violated their duty in not stopping at the exact place where the train had been accustomed to stop."

"12. The jury are further instructed that if they find that the plaintiff, after ringing the bell to stop the car, attempted to alight from the car before the train came to a full stop, but while its speed was being slackened, that she was guilty of contributory negligence, and that such facts do not make out a case which should entitle the plaintiff to recover."

We think the court was right in not giving these instructions. By them it was sought to have the trial court say what act or omission of Miss Craig was or was not negligence.

Again, a review of the entire record and of all the instructions given to the jury in this case convinces us that the plaintiff in error has no just ground to complain because the jury was not properly instructed, or sufficiently instructed.

At the request of the company the trial court charged the jury as follows:

"1. The jury are instructed that if the plaintiff attempted to get off from a moving cable car while the speed of the train was being slackened, but before the train had been brought to a full stop, she was guilty of contributory negligence, which bars her right of recovery if this be true, although the men in charge of the train did not immediately comply with her request to stop the train.

"2. The jury are further instructed that if the plaintiff signaled the car to stop and the car immediately began to

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slacken speed, and the plaintiff, without waiting for the car to stop, did step from the car while it was in motion, and was thereby injured, she cannot recover.

“3. The jury are further instructed that if the gripman in charge of the car had applied the brakes, and was bringing the train to a stop for the purpose of allowing the plaintiff to alight from the car, and the gripman, by applying the brakes and slackening the speed of the train for the purpose of stopping the train, was doing his duty, and that the only duty which the men in charge of the train owed to the plaintiff was to stop the train as soon as the same could be reasonably done, and if the men in charge of the train performed their duty in this respect, and were not guilty of any other wrongful or negligent act in connection with the stopping of the train, the plaintiff cannot recover, and your verdict should be for the defendant.

“4. The jury are further instructed that if you find from the evidence that the plaintiff, without waiting for the men in charge to bring the same to a stop, attempted to get off of the train while the same was in motion, and that injury resulted to her by reason of her own act in attempting to get off of the train while the same was in motion, and while the same was being brought to a stop, then the plaintiff cannot recover.

“5. The jury are further instructed that if they believe from the evidence that the plaintiff, in attempting to step off from the car while still in motion, stepped directly out from the car at right angles from the car, and that by reason of the momentum of the car, and her own body, she was caused to fall over northwards, the direction in which the car was moving, she was guilty of contributory negligence and cannot recover.

“6. The jury are further instructed that any failure of the defendant company, if such there was, to stop at the exact point where the company is accustomed to stop its cars, is not of itself negligence on the part of the company.

"7. The jury are further instructed that if they believe from the evidence that the plaintiff thought she could step from the car with safety to herself, even while the car was in motion, the fact that she so believed she could step from the car is not of itself proof that she was not guilty of contributory negligence.

"8. The jury are further instructed that the plaintiff assumed the responsibility of danger in attempting to step from the car while in motion, and if they find from the evidence that she did so, the fact that she misjudged her ability to get from the car with safety, if she did so misjudge her ability to alight with safety, does not show negligence on the part of the defendant company, and does not create any liability on the part of the defendant company.

"10. The jury are further instructed that if the plaintiff was injured by the accident caused by her attempting to jump off of a moving cable car, the defendant company is not liable unless the proof satisfies them that some negligent act on the part of the company's servants in charge of the train produced the injury shown by the evidence.

"11. The jury are instructed that if they believe from the evidence that there was a sudden movement of the car at the instant of time when the plaintiff was attempting to get off from the car, that such fact does not show negligence on the part of the railway company; for in order to show negligence on the part of the railway company, there must be some evidence of a sudden movement of the car attributable to some act or action of the men in charge of the train; and that such act of negligence on the part of the men in charge of the train cannot be determined by the jury from mere conjecture.

"13. The jury are further instructed that if the plaintiff believed that the train was about to pass the place of her destination without stopping, that such fact did not justify her in attempting to get off of the car while it was still in motion.

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"14. The jury are further instructed that under no circumstances can the plaintiff recover unless the defendant, by its agents and servants in charge of the train, did some act or was guilty of some negligence which contributed to the injury.

"15. If the jury should be satisfied from the evidence that when the plaintiff signaled the car to stop by the ringing of the bell for that purpose, the car immediately began to slacken its speed, and that the plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion, and was thereby injured, she cannot recover, and the defendant is entitled to the verdict."

Some of these instructions should not have been given. The first, second, fifth, seventh, and fifteenth, in effect, told the jury that if Miss Craig stepped from the car while in motion, she was guilty of contributory negligence. The sixth instruction told the jury that it was not negligence in the company not to stop its car at the point where the company was accustomed to stop its cars. It was not for the court to say; it was for the jury. By the eleventh instruction the court told the jury that if the company started its car with a sudden jerk at the instant when Miss Craig was attempting to step from the platform onto the street, that such act on its part was not negligence, and the instruction further proceeds to tell the jury why it was not negligence.

The final error assigned here is that the trial court erred in sustaining a challenge for cause submitted to one Woodworth, called as a juror. This man's examination was as follows:

Q. Mr. Woodworth, you have no bias or prejudice against the plaintiff in this suit?

A. I do not know the party at all.

Q. You have no bias or prejudice either for or against the street railway company?

A. No, sir.

Q. You know nothing about the facts in this case?

A. I do not think I ever heard of it until I heard Mr. Cowin state it. I may have read a notice of it in the papers; that is all.

Q. Then could you, or could you not, in your opinion, render a fair and impartial verdict, according to the law and the evidence, as you shall be instructed by this court.

A. Yes, sir.

Q. And your acquaintance with the officers of the railway company would not prevent you from rendering a fair and impartial verdict on the evidence as you shall be instructed by the court?

A. That would not interfere with my duties as a juror at all. The point I made, you know, was that other things being equal, then I would be more especially in favor of the street railway company, simply because of my acquaintance with them.

Q. You did not mean to say that would have any greater weight in this case where you happened to be acquainted with one of the parties to the lawsuit?

A. O, no. No sir.

Cross-examination:

Q. As I understood you before when I asked you the question whether your acquaintance with the stockholders and officers of the street railway company would interfere with your judgment or finding in the case, you stated, that other things being equal, you thought it would?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

We think that a juror should not only be unbiased and unprejudiced against both the parties to a suit, but that he should be indifferent as to which party succeeds; and that a juror who admits that an acquaintance with a party litigant would interfere with his judgment or finding in the case, is an incompetent juror; and that the court did not

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Anderson v. Vallery.

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abuse its discretion in sustaining a challenge submitted to Mr. Woodworth for cause.

The judgment of the district court is

**AFFIRMED.**

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**PETER A. ANDERSON v. HENRY W. VALLERY.**

FILED MARCH 6, 1894. No. 5637.

1. **Usury: RENEWAL OF NOTE: BONUS: QUESTION OF FACT.** An agent had for collection a promissory note belonging to his principal. The maker of the note paid such agent sufficient money to discharge said note, except the sum of \$165. Said agent, instead of applying on said note all the payments made, retained the sum of \$10 by way of a bonus, attorney or collection fee, and took a note from the debtor, payable to the agent's principal, for \$175, due six months afterwards, drawing interest at ten per cent, and secured by a chattel mortgage. *Held*, In a suit of replevin brought by the payee of said note for the possession of the mortgaged property, that whether said agent retained said sum of \$10 by way of a bonus, attorney or collection fee in consideration of a forbearance extended by him to the debtor for the payment of the \$165 remaining due on the note which the agent held for collection, was a question of fact properly submitted to the jury.
2. ———: ———: ———. In such case if the agent retained said \$10 as a bonus for forbearing present payment of the balance due on the note which he held for collection and for which the \$175 note was given, then taking such bonus rendered such last named note usurious.

ERROR from the district court of Saunders county. Tried below before BATES, J.

*Clark & Allen*, for plaintiff in error.

*J. K. Vandemark and Simpson & Sornborger*, contra.

RAGAN, C.

1. This is an action of replevin brought in the district court of Saunders county by Peter A. Anderson against

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Henry W. Vallery. Anderson claims that at the commencement of this suit he had a special ownership in, and was entitled to the immediate possession of, the property replevied. He bases his claim to the possession of this property under a chattel mortgage made thereon April 18, 1889, by Vallery, the owner of the property, which mortgage was given to secure the payment of a note of said date for \$175, due six months after date, drawing interest at ten per cent per annum from date, and payable to the order of Anderson. Anderson having been unsuccessful in the court below brings the case here on error.

The evidence in the record conclusively shows that one Bays was the agent for Anderson in all the transactions out of which this lawsuit arose; that on April 4, 1888, Vallery executed his note to Anderson for \$350, drawing interest at the rate of ten per cent per annum, and due one year after that date, and to secure the payment of the same he gave Anderson a chattel mortgage on certain personal property; that this latter note with mortgage, about the time of its maturity, was in the hands of Bays, as Anderson's agent, for collection. The evidence tends to show that Vallery paid to Anderson on this \$350 note sufficient money to discharge the same, both principal and interest, except \$165; that Bays, instead of applying all said money to the discharge of said \$350 note, retained \$10 as a bonus, attorney or collection fee, and took the note in suit from Vallery for the balance due on the note of \$350 and the \$10 retained by him. The evidence is undisputed that on the \$175 note Vallery made payments, before this suit was brought, as follows: October 29, 1889, \$55; November 16, 1889, \$57; and the evidence is undisputed that on the 17th day of February, 1889, the day the suit was brought, Vallery made a further payment on said note of \$70. Whether this \$70 was paid before or after the service of the summons in this case on Vallery is disputed, but there is no doubt but that Bays, who brought the suit for

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Anderson, was advised by Vallery before such suit was brought that the \$70 was on its way to him by express from Plattsmouth, where it seems Vallery had borrowed the money about the 15th of February. It appears that the action was originally commenced before a justice of the peace. One of the errors assigned here is that the verdict of the jury is not supported by the evidence. If the note for \$175 should have been for only \$165, as the evidence tends to show and the jury found, then the payments made by Vallery on this note were sufficient to pay it in full, both principal and interest, and there was nothing due on it when this suit was brought, provided the \$70 payment was made before the bringing of the suit. As before stated, the evidence tended very strongly to show that this \$70 payment was made before the suit was brought, and the jury, by its finding, has said that the payment was made before the bringing of the suit. The evidence in the record abundantly supports the finding of the jury, then, that at the time the suit was brought no sum of money whatever was due upon the note made the basis of the replevin action.

2. On the trial the court instructed the jury as follows: "You are instructed that if the plaintiff, by himself or his agent, contracted for, received, or reserved \$10 or other sum in excess of ten per cent per annum upon the pretense that the same was a commission or collection or attorney's fee, then the promissory note for \$175 would be usurious, and the plaintiff would not be entitled to recover or receive any sum greater than the sum shown to be due at the time of the execution of the said \$175 note." The giving of this instruction is now assigned as error. The contention is that there was no evidence of usury in the case to which the instruction was applicable. The action being one of replevin, and the pleadings being a petition and a general denial, the only issue of course was whether the plaintiff was entitled to the possession of the property replevied.

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To defeat this claim the defendant below was entitled to introduce any evidence which tended to disprove the right of the plaintiff to the possession of the property. The evidence introduced tending to show that Bays retained \$10 of the money paid him by Vallery for Anderson, as a bonus, collection or attorney fee, was competent, as it tended to show that this \$10 was reserved in consideration of a forbearance by Anderson, through his agent, Bays, extended to Vallery for the \$165 remaining unpaid of the old note. We think the jury would have been justified, under the evidence, in inferring that the \$10 retained by Bays—if it was so retained by him—was in consideration that he would extend the time to Vallery for the payment of the amount remaining due on the old note. It follows, therefore, that the court did not err in the instruction to the jury complained of. It was for the jury to say not only whether this \$10 was retained by Bays, but, if retained, for what purpose and on what account. It is said by counsel that if it be admitted that Bays retained the \$10, that that did not make the transaction usurious. We are unable to agree to this contention. It might, or it might not, make the transaction usurious. That would depend upon the intention and purpose with which the money was retained. Had Vallery paid the entire sum due on the note to Anderson or his agent, Bays, and Anderson or Bays had then loaned Vallery \$165 of the money, reserving \$10 by way of a bonus, commission, or collection fee, we do not think that counsel would question but that the transaction would have been usurious. Is there any difference in principle in the case supposed and the one which the testimony tends to establish? The rule of this court is that where one is entrusted with the business of lending money of another and exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by the statute, the transaction will be adjudged usurious. (*Cheney v. Eberhardt*, 8 Neb., 423.)

3. The next error assigned is in giving an instruction by the court to the jury as follows: "You are instructed that if at the time of the commencement of this action the defendant had tendered to the plaintiff, or his agent, Bays, \$20, or any other sum, which, added to any sums which had before that time been paid, aggregated an amount equal to, or greater than, the amount actually due to the plaintiff at that time, then the jury should not take into consideration any amount thereafter paid by the plaintiff in his efforts to collect or enforce his claim." Counsel say that this instruction was erroneous because there was no evidence of a tender, and because the instruction lays down the rule that if the sum due on a debt is tendered at any time before trial, all costs thereafter made must fall on the creditor; but counsel misunderstands this instruction. It tells the jury that if they find, at the time suit was brought, Vallery had already paid or tendered to Anderson all the money due on the note, then the jury could not take into consideration any money paid out by Anderson after such payment and tender in his efforts to collect his debt. The jury had no right to take into consideration in this case any money paid out by Anderson in his efforts to collect this debt, whether paid before or after the tender. Anderson had to succeed by establishing a lien upon the mortgaged property, and that lien could only be established by showing that some sum remained due on the debt which the mortgage secured; and there is no dispute in the record but that Vallery had paid on the note the sums of \$55, \$57, and \$70. The only dispute as to these payments was the exact time at which this \$70 was paid. The instruction certainly did not prejudice the plaintiff in error.

As to the other reason assigned by counsel as to why this instruction was erroneous, viz., that the record contained no evidence of a tender, this is to be said: It appears that Vallery's first answer to the petition of replevin, among other defenses, set out that on the 16th day of February,

the day before the suit was brought, he had paid Bays for Anderson \$70, and tendered him \$20 in full satisfaction of the note. The case was not tried on this answer, but, by permission of the court, Vallery filed an amended answer, consisting of a general denial. On the trial Vallery introduced no evidence on the subject of a tender, but Anderson's counsel, for some reason not disclosed by the record, over the objection of Vallery, put this first answer of Vallery in evidence; and at the request of the plaintiff in error the court instructed the jury: "The jury are instructed that if they find from the evidence that the tender shown on the trial was insufficient in amount to cover the amount due the plaintiff at the time the tender was made, then the jury will find that such tender was no defense." The plaintiff in error is in no position now to say that there was no evidence of a tender in the record. He proved that fact by putting in evidence Vallery's answer; and not only that, but at his request the court instructed the jury as to the effect of this tender. The rule laid down in *Tompkins v. Batie*, 11 Neb., 147, cited by counsel, is not applicable to this case. The court did not tell the jury, in the instruction on the subject of tender, that if they found Vallery tendered as much or more money to Bays than was due on the \$175 note, such tender amounted to a payment of the note and released the mortgage lien. Had he done so the instruction would have been bad. What the court did tell the jury was, in effect, that they should not take into consideration any costs made by Anderson in attempting to collect his debt after the tender made. This was correct. The judgment of the district court is

**AFFIRMED.**

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 Fremont Butter & Egg Co. v. Snyder.
 

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39	632
130	636
39	632
45	357

## FREMONT BUTTER & EGG COMPANY V. F. J. SNYDER & COMPANY.

FILED MARCH 6, 1894. No. 5281.

1. **Actions Against Corporations: VENUE.** The Fremont Butter & Egg Company was a corporation organized under the laws of the state for the purpose of buying and selling butter and eggs. Its principal place of business, as fixed by its charter, was in Dodge county, and its chief officer resided there. It had and maintained in Saunders county a place of business, there exercised its corporate functions, and had there employes conducting the business for which it was organized. *Held*, That, within the meaning of section 55 of the Code of Civil Procedure, the corporation was situated in Saunders county and suable there.
2. ———: ———. Section 55 of the Code of Civil Procedure provides: "An action \* \* \* against a corporation created by the laws of this state may be brought in the county in which it is situated or has its principal office or place of business." \* \* *Held*, That the meaning of this statute is that a domestic corporation may be sued (a) in the county where its principal place of business is fixed by its charter, although its actual business is carried on and its officers reside in some other county; (b) that a domestic corporation, except those governed by sections 56, 57, and 58 of the Code of Civil Procedure, may be sued in any county where it is situated, and that it is situated in any county where it has and maintains a place of business, and servants, employes, or agents engaged in conducting and carrying on the business for which it exists.

ERROR from the district court of Saunders county. Tried below before MARSHALL, J.

*G. W. Simpson and Frick & Dolezal*, for plaintiff in error.

*George I. Wright and J. R. Gilkeson*, contra.

RAGAN, C.

F. J. Snyder & Co. sued the Fremont Butter & Egg Company (hereinafter called the "corporation") in the dis-

strict court of Saunders county for the price of some butter and eggs alleged to have been sold and delivered by the former to the latter. The answer of the corporation alleged two defenses: (1.) A general denial. (2.) That it was a domestic corporation, having its principal place of business at the city of Fremont, in Dodge county; that it was served with summons in Saunders county, and therefore the district court of that county had no jurisdiction over it. The corporation, having been unsuccessful in the district court brings the case here, alleging:

1. That the verdict of the jury, on which is based the judgment here sought to be reversed, is contrary to the evidence. The record shows that the corporation was organized under the general incorporation laws of the state, its principal place of business, as fixed by its charter, being in the city of Fremont, in Dodge county, where its general manager resided. It is a trading corporation, engaged in the buying, packing, shipping, and sale of butter, and the buying, assorting, candling, boxing, shipping, and sale of eggs. It had "branch houses" at Red Oak, Iowa, and in Beatrice and Wahoo, Nebraska. In the latter city, at the time and for some years prior to the time of the transaction out of which this suit arose, it had a place of business—business house—on which it kept its sign, viz.: "Fremont Butter & Egg Co., Buyers of Butter and Eggs." The corporation had in its employ there one or more persons. Butter and eggs were bought by these employes or persons operating for the corporation and in its name. The eggs were assorted, candled, and boxed at this place of business by these employes of the corporation, and then shipped to the Fremont house, or to such other point as the corporation's general manager directed. The general manager of the corporation was frequently in Wahoo looking after the business there. Among others who bought butter and eggs at this point for the corporation was one Darrah. It is claimed by the corporation that he

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Fremont Butter & Egg Co. v. Snyder.

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was operating on his own account and not as the corporation's agent, and that Darrah bought the goods sued for of the producers and the corporation bought them of Darrah. This contention, however, is disputed, and the evidence supports the jury's finding that Darrah, in buying the property sued for, was acting for, and on behalf of the corporation. It appears from the record that the corporation clothed this man Darrah for years with the authority of an agent. He was, to the corporation's knowledge, buying butter and eggs for the corporation at Wahoo, turning over the property bought to the corporation at its place of business in Wahoo, and drawing drafts on the corporation through the banks of Wahoo to pay for the goods bought. The corporation cannot now escape payment for goods thus purchased by Darrah and received by it by denying Darrah's agency. The corporation's conduct and course of business and dealing through this man was of itself sufficient to lull the inquiry of all reasonable men and induce them to believe that Darrah was, in fact, what he appeared to be, the corporation's agent. The evidence abundantly justifies the finding of the jury that Darrah was the purchasing agent of the corporation, and that in all that he did he was acting for and on its behalf.

2. The next error assigned is that the district court of Saunders county had no jurisdiction of the corporation, as it could be sued only in Dodge county, that being the location of its principal place of business. Section 55 of the Code of Civil Procedure provides: "An action \* \* \* against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business." \* \* \* It is argued that the word "may" in this section means "must," and that the word "situated" is synonymous with "principal place of business." But the able counsel are mistaken in their construction. The meaning of this statute is that a domestic corporation may be sued (1) in the county where

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Fremont Butter & Egg Co. v. Snyder.

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its principal place of business is fixed by its charter, and this though its actual business is carried on and its officers reside in some other county ; (2) that a domestic corporation may be sued in any county where it is situated, and it is situated where it has and maintains a place of business and servants, employes, or agents engaged in conducting and carrying on the business for which it exists. This statute was not intended to limit the county in which a domestic corporation, except those mentioned in sections 56, 57, and 58 of the Code of Civil Procedure, could be sued to the one in which it has its principal place of business, but rather was enacted for the benefit of creditors and persons having claims against a domestic corporation. There are a number of lumber companies, corporations, whose principal places of business are in the cities of Omaha and Lincoln, having places of business and employes exercising their corporate functions in the various counties of the state. It was not intended by this statute that such corporations could only be sued in Douglas and Lancaster counties. If counsels' contention is correct, the corporation at bar, if it refused to pay the rent of, or vacate, the building it occupies in Wahoo, could only be sued for rent or in forcible detainer in Dodge county. The mere statement of the proposition refutes it. The corporation sued in this case had, in Saunders county, a place of business, agents, and employes, and was exercising its corporate functions in that county, and, hence, was situated and suable there.

3. We have not been unmindful of the complaints made by counsel for the corporation that the court erred in certain instructions given to the jury, and in the admission and rejection of certain testimony at the trial. We have carefully examined the instructions and the evidence complained of and have reached the conclusion that the court was not in error in the matters complained of. It follows that the judgment of the district court must be, and the same is

AFFIRMED.

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Fremont Butter & Egg Co. v. Killian.Lewis v. Baker.

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**FREMONT BUTTER & EGG COMPANY V. THOMAS KILLIAN  
& COMPANY.**

FILED MARCH 6, 1894. No. 5280.

**Actions Against Corporations: VENUE.** Following *Fremont Butter & Egg Co. v. Snyder*, 39 Neb., 632, the judgment in this case is affirmed.

ERROR from the district court of Saunders county. Tried below before MARSHALL, J.

*G. W. Simpson and Frick & Dolezal*, for plaintiff in error.

*S. H. Sornborger, contra*, on the question of jurisdiction, cited: *Bristol v. Chicago & A. R. Co.*, 15 Ill., 436; *Baldwin v. Mississippi & M. R. Co.*, 5 Ia., 518.

RAGAN, C.

The facts in this case and the law applicable thereto are substantially the same as in the *Fremont Butter & Egg Co. v. Snyder*, decided at this term and reported in 39 Neb., 632, and on the authority of that case the judgment in this is

**AFFIRMED.**

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**GEORGE P. LEWIS ET AL. V. CARRIE R. BAKER.**

FILED MARCH 6, 1894. No. 5121.

**Adverse Possession.** When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant. *Meyer v. City of Lincoln*, 33 Neb., 566, followed.

ERROR from the district court of Boone county. Tried below before HARRISON, J.

*F. S. Howell*, for plaintiffs in error.

*J. A. Price*, *contra*.

RAGAN, C.

This is an injunction proceeding brought in the district court of Boone county by Carrie R. Baker against the village of Albion and one George P. Lewis, the overseer of streets of said village. The substantial allegations of the petition are that in the year 1879 one Mansfield owned lots 14 and 15, in block 2, of Mansfield's addition to the village of Albion, and on the first day of March of said year he conveyed said lots to one Diffenderfer who took possession of said lots, and inclosed them, together with a strip of ground nine feet and five inches in width, on the south side thereof, by erecting around said lots and said ground a post and board fence; that on the 1st day of November, 1880, Diffenderfer conveyed said premises to one Letson; that on said last date said Letson conveyed said real estate to one Matilda Diffenderfer, who took possession of the same as inclosed; that on the 2d day of July, 1887, said Matilda Diffenderfer and husband conveyed said premises to the plaintiff, and that she, in the year 1887, removed the fence which Diffenderfer had built around said lots and strip of ground, and on the same day erected in its place and on the same line a new and costly fence of posts and boards, which fence she caused to be painted, as well to make it ornamental as to preserve it, and that said fence remained as built at the time of the institution of this suit; that the plaintiff and those under whom she derived title had been in the open, notorious, exclusive, continuous, adverse possession as owners of said premises and every part thereof as inclosed by said fence for more than

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Lewis v. Baker.

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ten years immediately before the commencement of this suit; that plaintiff's dwelling house and barn were on said lots so inclosed; that the said strip of ground of nine feet and five inches in width, adjoining said lots on the south and inclosed with them, had for more than ten years formed a part of the lawn of the plaintiff's dwelling house; that she had spent much time, labor, and money in having said lawn improved and cared for; that on said strip of ground were a number of shade and ornamental trees upon which she had bestowed much time, labor, and care; that said strip of ground had received the same care and had been improved and occupied in the same manner as other parts of said premises inclosed by said fence; that the defendants claimed that said strip of ground was a part of one of the public streets of said defendant village, and were threatening to cut down, remove, and destroy said fence and appropriate said strip of ground to the public use as a street. To this petition the parties made defendant filed a general demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. The trial court overruled this demurrer, to which ruling the defendants took an exception, and, refusing to plead further, the court granted a perpetual injunction as prayed for, and the parties made defendant below bring the case here.

There are two points relied upon for a reversal of this decree:

1. That although the petition shows that Baker had been for more than ten years immediately before the bringing of the suit in the open, notorious, exclusive, and adverse possession of the premises, yet it does not appear from the petition that she and her grantors held such possession under a claim of title thereto. We do not think this contention can be maintained. True, the precise expression, "under claim of title," is not found in the petition, nor is it essential to the validity of the petition that it should be. It appears from the allegations of the com-

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Hornberger v. Orchard.

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plaint that the use and possession of said premises by Baker and her grantors had been and were that of absolute owners. In other words, the facts stated in the petition sufficiently show that Baker and her grantors had been and were occupying the premises, claiming title to the same.

2. The second point relied upon to reverse this judgment is that adverse possession, though for the statutory time, did not vest Baker with the title to the strip of ground, because it was a part of a public street. This point has been, by this court, decided adversely to the contention of the plaintiffs in error. See *Meyer v. City of Lincoln*, 33 Neb., 566, where it is held, "When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant." In that case the question at bar was very thoroughly considered, and the authorities on both sides of the question examined and collated. We are satisfied with both the reasoning and the conclusion reached in that case and adhere to the same. Upon the authority of that case the judgment of the district court, assailed here, is

AFFIRMED.

HARRISON, J., having presided in the trial of the case below, took no part in the consideration here.

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HENRY HORNBERGER ET AL. V. SAMUEL A. ORCHARD.

FILED MARCH 6, 1894. No. 4941.

**Unincorporated Associations: LIABILITY OF MEMBERS.** One is not liable for the debts of a voluntary unincorporated association incurred by it at a time when he was not a member thereof, unless by express contract, based on a good consideration, which must be alleged and proved.

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ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

*Schomp & Corson*, for plaintiffs in error.

*Brome, Andrews & Sheean*, contra.

RAGAN, C.

Samuel A. Orchard sued the plaintiffs in error and forty-five others in the district court of Douglas county, and in his petition alleged that on the 17th of September, 1887, the parties made defendants were members of an unincorporated association known as the Junior Order of United American Mechanics, organized for social and recreative purposes only, and not for the holding of any property or the carrying on of any trade or business; that prior to the 17th day of September, 1887, the defendants, at a meeting of said association, ordered that carpets, matting, and shades be procured and placed in a hall for the use of the association; and that Orchard did, on the 17th day of September, 1887, furnish said hall for the defendants' use, with certain carpets, matting, and shades, and performed the necessary work and labor of placing the same in said hall; that said defendants then and there accepted the said carpets, matting, and shades in said hall, and for a long time thereafter used the same therein, and repeatedly promised to pay therefor; and that the bill was past due and wholly unpaid. The plaintiffs in error filed separate answers, each consisting of a general denial. There was a verdict and judgment against the plaintiffs in error, who bring the case here for review.

In the petition in error on file there are thirty-one errors assigned, only two of which we shall notice.

1. The plaintiffs in error complain because of the refusal of the court to give the sixth instruction asked for by them. That instruction was as follows: "If you find that

the goods were sold either to a committee for the use of the society known as the Junior Order of United American Mechanics, and the credit was given either to said committee or even to the Junior Order of United American Mechanics, no person who was not liable, either as principal or agent, at the time of sale or when credit was given can be made so by any promise or words of his that was not in writing, and although if each of these said defendants not so primarily liable had promised and agreed to pay this bill, or any part thereof, he cannot be held thereto unless such promise was in writing; the statute of frauds in our state being that no person can become liable for the debt of another person or persons unless the same shall be in writing and subscribed to by the party sought to be charged therewith." This society was an unincorporated voluntary association, supported by the initiation fees and dues charged its members, and the liability of its members to its creditors are governed by the law of agency. (*Gorman v. Russell*, 14 Cal., 532; *Moore v. Brink*, 4 Hun [N. Y.], 402; *Butterfield v. Beardsley*, 28 Mich., 412; *Tyrrell v. Washburn*, 88 Mass., 466; *Bullard v. Kinney*, 10 Cal., 60; *Taft v. Ward*, 106 Mass., 518; *Bodwell v. Eastman*, 106 Mass., 525; *Davison v. Holden*, 55 Conn., 103; *Tappan v. Bailey*, 45 Mass., 529; *Park v. Spaulding*, 10 Hun [N. Y.], 128.) It will be observed that Orchard based his right to recover of plaintiffs in error on the ground that they were members of the society and present at the meeting when the goods were ordered, or afterwards learned of the purchase; that the bill was unpaid; attended meetings at which the payment was discussed, acknowledged to be correct, and promised to be paid, and thereby ratified the contract of the society in purchasing the goods, even if they, the plaintiffs in error, were not present at the meeting at which the purchase was ordered. Under the pleadings, oral testimony that plaintiffs in error promised to pay this bill would not have been

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competent, except upon the theory that they were members of the society when the debt was contracted. But there was testimony which tended to show that the plaintiffs in error were members of the society and present at the meeting at which the goods were ordered; and there was also testimony which tended to show that after the goods were purchased and in the hall, plaintiffs in error were present at meetings of the society at which the payment of the bill for the goods was discussed, its correctness acknowledged, and payment promised. This testimony was competent under the issues. The question then at which this instruction was aimed was not one of the statute of frauds, but of agency; the plaintiff's theory being that even if the plaintiffs in error were not present at the meeting when the goods were bought, yet being members at that time, and afterwards learning of the purchase and promising to pay it, they had ratified what the society did. There was no error then in refusing to give this instruction. Again, if the pleadings of the plaintiff had sought to hold the plaintiffs in error liable for this bill by an allegation that they were not members of the society when it was contracted, but joined the society afterwards and then promised to pay it, the plaintiffs in error, to have availed themselves of the statute of frauds as a defense, must have pleaded it.

2. The plaintiffs in error also complain because of the refusal of the court to give the thirteenth instruction asked for by them. It was as follows: "None of these defendants, by becoming members of the Junior Order of United American Mechanics, became liable for any of the past indebtedness that had been incurred, or was owing by said association, or by any member or committee thereof, prior to the time he associated himself therewith." Were the plaintiffs in error entitled to have this instruction given to the jury, and was the refusal of the court to give it error? This instruction presented the question squarely as to whether these plaintiffs in error were liable for the debts

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of the association contracted prior to the time they became members of it. Nowhere in the trial of this case, nor in the instructions given by the learned court, was the distinction drawn as to the liability of these plaintiffs in error, as asked for by this instruction. Indeed, the court, by its instructions, told the jury substantially that any defendant who was a member of the order (without reference to the time when he became such) and attended its meeting, and knew of the purchase of the goods in question, and used said goods after they were placed in the hall, knowing that they had not been paid for, became liable. The testimony as to whether the plaintiffs in error were members of the society when the goods were purchased was very contradictory. It is not denied that the plaintiffs in error were members of the society, but there was much testimony tending to show that they did not become members until after the purchase of the goods. The plaintiffs in error were entitled to an instruction to the effect that their liability did not attach for any debts of the society prior to the date of their becoming members of it; and nowhere in the record was there any such instruction given; and, as before observed, Orchard based his right to hold the plaintiffs in error liable on the theory that they were members of the society when the goods were purchased. The charges of the court and the instructions given by him at the request of the plaintiff left room for the jury to infer that if the plaintiffs in error became members after the debt was contracted, and then attended meetings of the society at which the debt was spoken of, acknowledged to be unpaid, and promises made to pay it, the plaintiffs in error thereby ratified and became liable to pay for what the society had done before they joined it. No member of a voluntary unincorporated association is liable for any debt contracted by such society, unless at the time the debt was incurred he was a member thereof, except by an express contract, based on a good consideration, all which must be alleged

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and proved. There is sufficient testimony in the record for the jury to have found that the plaintiffs in error were members of the society when the debt was contracted. On the other hand, there was abundant evidence to support a finding that they were not members at the time the debt was contracted, and the instructions of the court left ample room for them to infer that the plaintiffs in error had become liable, even if they joined the society after the debt was contracted, by attending its meetings after that time at which the debt was discussed and promised to be paid. It is impossible for us to say whether the jury's finding is predicated upon the evidence that the plaintiffs in error were members at the time the debt was contracted, or whether it is predicated upon the evidence that they attended meetings after it was contracted at which the debt was discussed and promises made to pay it.

The authorities cited by the defendant in error, none of them, reach the point raised by this instruction. In all the cases cited by him the parties sued were members of the association at the time the debt was contracted, and, so far as appears from the reported cases, that was not a disputed question on the trial. We are constrained to say, after much reflection and research, that the plaintiffs in error were entitled to have the instruction asked for given to the jury, and its refusal was error to their prejudice. The judgment of the court below is therefore reversed and the cause remanded to that court to grant the plaintiffs in error a new trial.

REVERSED AND REMANDED.

WILLIAM H. EDWARDS ET AL., APPELLEES, V. SARAH  
A. REID ET AL., APPELLANTS,

AND

OLOF BERGGREN, APPELLEE, V. SARAH A. REID ET AL.,  
APPELLANTS.

39	645
41	85
39	645
44	277

FILED MARCH 6, 1894. No. 5553.

1. **Homestead: ABANDONMENT.** Two things must concur to show an abandonment of a homestead, viz., an intention to abandon and actual abandonment. *Eckman v. Scott*, 34 Neb., 817, adhered to.
2. ———: ———. The rule is, that to establish abandonment of a homestead the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning, or after such removal he formed the intention of remaining away.
3. ———: ———: **CREDITOR'S BILL: FRAUDULENT CONVEYANCES.**  
A man and wife removed from their farm, owned by the wife, to a neighboring town, where they lived for some years in a rented house and in which the man pursued the business of shoe-making. They left a son in charge of the farm and the greater part of their household goods, and all their stock and farming implements also remained on the farm. The wife divided her time between her place of abode in town and the farm, keeping general supervision of the latter and doing there the laundry work and part of the cooking for herself and husband. The man died and the widow sold the farm. In a suit by her creditors to set aside her conveyance as fraudulent, *held* that, as the evidence did not show that the man and wife left the farm with the intention of not returning, their removal to and residence in town did not work an abandonment of the homestead.
4. ———: ———: **INTENTION.** Removing from a homestead and residing temporarily elsewhere for the purpose of business, pleasure, or health, will not work an abandonment of a homestead, unless coupled with such removal is the intention not to return, or after removal the intention is formed of remaining away.
5. **Fraudulent Conveyances: NOTICE TO PURCHASER.** To avoid a sale upon the ground that it is fraudulent as to creditors, the purchaser must have notice of such facts tending to show

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such fraudulent purpose as would put a person of ordinary prudence on inquiry. (*Temple v. Smith*, 13 Neb., 513, adhered to.)

6. ———: CANCELLATION OF CONVEYANCE: VALIDITY OF DECREE WITHOUT FINDINGS. In a suit by a creditor to set aside a conveyance of real estate on the ground that the same was made to defraud him, to the knowledge of the defendant, the court, without either a general or a special finding against such defendant, entered a decree annulling the conveyance, as prayed. *Held*, That it was erroneous to pronounce a decree annulling the defendant's title without either a general or a special finding against him. (Sec. 297, Code Civil Procedure.) *Foster v. Devinney*, 28 Neb., 416, adhered to.

APPEAL from the district court of Saunders county.  
Heard below before BATES, J.

*N. H. Bell* and *M. B. Reese*, for appellants, contending that the homestead was originally acquired and never abandoned, cited: *Dorrington v. Myers*, 11 Neb., 388; *Dennis v. Omaha Nat. Bank*, 19 Neb., 677; *McFarland v. Washington*, 14 S. W. Rep. [Ky.], 354; *Reilly v. Reilly*, 26 N. E. Rep. [Ill.], 604; *Moore v. Flynn*, 25 N. E. Rep. [Ill.], 844; *Duffey v. Willis*, 12 S. W. Rep. [Mo.], 520; *Rollins v. O'Farrell*, 13 S. W. Rep. [Tex.], 102; *Freeman*, Executions, sec. 248, and cases cited; *Eckman v. Scott*, 34 Neb., 817; *Thompson*, Homesteads & Exemptions, sec. 285; *Rix v. Capitol Bank of Topeka*, 2 Dill. [U. S.], 370; *Bloedorn v. Jewell*, 34 Neb., 649.

*Simpson & Sornborger*, contra, on the question of homestead, cited: *Thompson*, Homesteads & Exemptions, secs. 265, 266; *Fyffe v. Beers*, 18 Ia., 7; *Kimball v. Wilson*, 59 Ia., 638; *Cotton v. Hamil*, 58 Ia., 594.

RAGAN, C.

The evidence before us shows that in the year 1881 one Alfred Reid purchased the west half of the southeast quarter of section 25, in township 15 north and range 7 west, in Saunders county, Nebraska, and about the year

1884 moved upon, improved, and began farming and occupying said land as the homestead of himself and family. Some time after this he conveyed the land to his wife, Sarah A. Reid. That he was a shoemaker by occupation, and being unable, on account of poor health, to do the work on the farm, about the year 1886 he rented a building in Wahoo, to which he and his wife removed a part of their household goods, and used this building as their temporary home and Mr. Reid's shoe shop. At the time Mr. and Mrs. Reid came to Wahoo they left their farm in charge of a son, and left also on the farm all their stock and farming utensils, and the greater part of their household goods. Mrs. Reid divided her time between the farm and her abode in Wahoo, a few miles distant. She did the laundry work and some of the cooking for herself and husband on the farm. Thus matters stood until August, 1887, when Mr. Reid died. On November 1, 1887, Mrs. Reid sold and conveyed the farm to her daughter, Mrs. Starks, the consideration being \$600, evidenced by two notes of Mrs. Starks of \$300 each; the assumption by her of mortgages on the land amounting to \$1,200, and the promise to provide her mother with a home, she being then about fifty-two years of age. In February, 1889, Mrs. Reid sold her property on the farm, and the daughter rented the land for that year for cash rent. On January 30, 1890, Mrs. Starks and her husband sold and conveyed the land to one Krailick. On July 27, 1889, one Olof Berggren recovered a judgment against Mrs. Reid and one C. M. Frey, her son by a former husband, for \$90.95. A transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county on January 13, 1890. November 1, 1887, Edwards & Castle recovered a judgment in the county court of Saunders county against Mrs. Reid for \$80.80, and on February 14, 1888, a transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county.

Executions having been issued and returned unsatisfied, Edwards & Castle and Berggren, in March, 1890, each brought suit in equity against Sarah A. Reid, Abbie A. Starks, and Joseph Krailick, alleging that the conveyance from Mrs. Reid to Mrs. Starks was made and received without consideration and for the fraudulent purpose of hindering and delaying Mrs. Reid's creditors in the collection of their debts; and alleging that Krailick's interest in the land was acquired with knowledge of Mrs. Reid's interest in the land and the existence of plaintiff's judgment.

The answer of the parties made defendants and the replies thereto made the following issues: (1.) Whether the conveyance from Mrs. Reid to Mrs. Starks was made and accepted in good faith and for a valuable consideration. (2.) Whether Krailick was an innocent purchaser. (3.) Whether the land at the time it was conveyed to Mrs. Starks by Mrs. Reid was the latter's homestead. The court found and decreed the issues for the complainants, the cases having been consolidated and tried together, and the defendants below bring the case here on appeal.

1. Was the conveyance from Mrs. Reid to Mrs. Starks made and accepted without consideration and with a fraudulent purpose? As to the consideration, the evidence is that Mrs. Starks assumed \$1,200 of incumbrances on the land, gave her notes for \$600, and promised to provide the grantor a home. The land was worth at the time about \$2,600. This was, as between the parties, a good consideration; or, to express it differently, it was not a conveyance wholly without consideration. As to the intent with which this conveyance was made and accepted, for the purposes of this opinion we may disregard Mrs. Reid and her intentions in making the conveyance. If her purpose was fraudulent, and we do not wish to be understood as saying that this record discloses that it was, still, to invalidate the conveyance, Mrs. Reid's fraudulent purpose and intent must have been known to and participated in by

Mrs. Starks. (*Hedman v. Anderson*, 6 Neb., 393; *Smith v. Schmitz*, 10 Neb., 600; *Keith v. Heffelfinger*, 12 Neb., 497; *Burley v. Millard*, 11 Neb., 286; *Crab v. Morrissey*, 31 Neb., 161; *Spring Lake Iron Co. v. Waters*, 50 Mich., 13.) Or, Mrs. Starks must have had notice of such facts, tending to show fraudulent purposes on the part of Mrs. Reid, as would put a person of ordinary prudence on inquiry. (*Temple v. Smith*, 13 Neb., 513; *Bollman v. Lucas*, 22 Neb., 796.) There is no evidence in this record which shows, or tends to show, that Mrs. Starks, at the time she took the deed, knew, or had any reason to suspect, that Mrs. Reid was indebted to any one; nor can such an inference be reasonably drawn from any or all the testimony. The evidence, and all the evidence, on the subject is that Mrs. Starks knew nothing of her mother's indebtedness until after the sale and conveyance of the land to Krailick, nor was any attempt made to show the contrary. Indeed, it would seem from the record, although not expressly so stated, that Berggren's debt was not contracted until 1889. His judgment before the justice of the peace was rendered one year and nine months after, and his transcript thereof filed two years and two months after the date of the conveyance from Mrs. Reid to Mrs. Starks was recorded. We think, therefore, the decree, in so far at least as it finds that Mrs. Starks accepted this conveyance with intent to defraud her mother's creditors, or with knowledge or notice that her mother intended by the conveyance to defraud her creditors, is without any evidence to support it.

2. We come now to the consideration of that part of the decree of the district court in and by which the conveyance from Mrs. Starks to Joseph Krailick was set aside. There is no general finding in favor of appellees or against appellants; nor is there any special finding as to whether Krailick was or was not a *bona fide* purchaser of this land, nor even that he knew of appellees' claims before paying the purchase money to Mrs. Starks, as appellees allege in

their petition. The court found specially that the conveyance from Mrs. Reid to Mrs. Starks was made and accepted without consideration and with the intent to defraud Mrs. Reid's creditors; and, without more ado, proceeded to decree that not only that conveyance but the one by Mrs. Starks to Krailick be set aside. The only issue in the case so far as Krailick was concerned was whether he was a *bona fide* purchaser of the property, and it was error for the court to pronounce a decree annulling his title without either a special or a general finding against him. (Sec. 297, Code of Civil Procedure; *Sprick v. Washington County*, 3 Neb., 253; *Smith v. Silvis*, 8 Neb., 164; *Foster v. Devinney*, 28 Neb., 416.) This decree, then, against Krailick cannot stand, but in view of the disposition we have decided to make of the entire case, we shall not send it back for a retrial. In view of the evidence, or rather the absence of evidence, in the record, a finding of the court against Krailick would not avail to support the decree. There is no pretense that Krailick had any knowledge or notice of Mrs. Reid's debts or the alleged fraudulent intent or purpose of Mrs. Reid and Mrs. Starks in the matter of the conveyance of the land at the time he bought of Mrs. Starks; nor that he did not pay full consideration for the land. The only claim made against him is that before he paid over the purchase money he learned of appellees' debts and claims in the premises. It appears from the evidence that Krailick bought the land prior to 1890, and took a bond for a deed; that Mrs. Starks' conveyance to him is dated January 3, 1890; that Krailick borrowed the money of or through a loan company to pay Mrs. Starks and left the money in the bank for her, and so advised her, and that when she called for the money the bank refused to pay it over unless appellees' claims were paid. In short, there is no evidence before us from which the court would have been justified in finding that Krailick was anything other than a *bona fide* purchaser of this land, with all that that term implies.

3. The controlling factor in this case, however, is that at the date Mrs. Reid conveyed this land to Mrs. Starks it was Mrs. Reid's homestead, and therefore not susceptible of fraudulent alienation. The contention of appellees is that because Mrs. Reid and her husband left the farm and resided in Wahoo, they thereby abandoned the homestead. All the evidence is that they left it temporarily, and the evidence does not support the court's conclusion, if it made such, that they abandoned the homestead; *i. e.*, that they left it with the intention of not returning. The rule is, that to establish abandonment of a homestead the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after such removal he formed the intention of remaining away. (*Eckman v. Scott*, 34 Neb., 817; *Gouhenant v. Cockrell*, 20 Tex., 98.) In *Duffey v. Willis*, 12 S. W. Rep. [Mo.], 520, defendant left his homestead for several years, doing business in other places part of the time. The homestead property was rented from month to month, and was at one time vacated by the tenant; and defendant then intended to return to it, but was prevented by his business. There was evidence that defendant's residence elsewhere was temporary, and that he intended to return. He acquired no new home elsewhere. The supreme court of Missouri held that these facts did not work an abandonment of the homestead. (See also *McFarland v. Washington*, 14 S. W. Rep. [Ky.], 354.) A case very like the one at bar is found in *Kenley v. Hudelson*, 99 Ill., 493. It is said in the opinion in that case: "It appears from the evidence that complainant resided on the premises about six years until February, 1876, when she rented to a tenant and moved to Louisville, a town about three miles distant, for the purpose of educating an invalid child. At the time she moved she expressed an intention to return. When the lease was made she reserved the right to move back at the end of the year. She did not move all her personal property away. She left farming

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implements, a loom, spinning-wheel, bedsteads, etc. From the testimony, it is apparent complainant did not abandon the homestead. \* \* \* Where a person leaves a place which is occupied as a homestead, for a temporary purpose, intending to return, \* \* \* it cannot be held that the homestead has been abandoned." The cases agree in holding that removing from a homestead and residing elsewhere for the purpose of business, health, or pleasure does not work an abandonment of the homestead, unless coupled with such removal is the intention not to return. We reach the conclusion then, and so decide, that the removal of Mrs. Reid and her husband from the farm to Wahoo and their residence there did not work an abandonment of their homestead. The unbending rule of this court is that a finding of fact made by a jury or trial judge will not be disturbed by this court if supported by competent evidence; that this court will not weigh conflicting evidence, nor pass judgment upon the credibility of witnesses; but we place the decision in this case not on the ground that the district court's decree is not supported by sufficient evidence, nor that it is contrary to the evidence, nor that it is contrary to the weight of the evidence, but we predicate our conclusion expressly on the ground that there is no evidence in the record from which the trial court could find that Mrs. Reid and her husband left their home with the intention of not returning. The decree appealed from is reversed and a decree will be entered in this court dismissing the cases of the appellees at their costs.

JUDGMENT ACCORDINGLY.

## FRED HUNZINGER V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5352.

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130	658
130	659
130	660
30	653
44	565

## 1. Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.

The proviso in section 1, chapter 50, Compiled Statutes, 1893, that "*Provided*, Such [county] board shall not have power to issue any license for the sale of any liquors in any city or incorporated village, or within two miles of the same," is not obnoxious to any provision of the constitution, because the inhabitants living within two miles of the corporate limits of the cities and villages of the state, situated in counties not having 150,000 inhabitants, are, by such proviso, deprived of the privilege of having the sale of the liquors licensed within their territory. *Pleuler v. State*, 11 Neb., 547, reaffirmed.

## 2. ———: LICENSE LAW. THE LEGISLATURE, in the exercise of the police power of the state, may not only control the license and sale of intoxicating liquor therein, but may entirely prohibit such license and sale.

3. ———: ———: SPECIAL LEGISLATION. The proviso in said section 1 in said chapter 50, that "*Provided*, In counties having 150,000 inhabitants the county commissioners may also issue licenses within two miles of any city in said county," is not obnoxious to section 15 of article 3 of the constitution as assuming to "regulate county and township offices;" nor is said proviso obnoxious to said constitutional provision as class or special legislation.4. Special Legislation: CONSTITUTIONAL LAW. An act of the legislature will not be declared special legislation, within the meaning of the constitution, solely because at the time of its enactment there was only one county in the state to which its provisions were applicable. If the law is general in its terms, and restricted by its terms to no particular locality, and operates equally upon all of a group of objects, it is not a special law. *McClay v. City of Lincoln*, 32 Neb., 412, followed.

## 5. Violation of License Law: DEFENSE. To an indictment for selling liquors in this state without a license, it is no defense that such sale was made at a time or place or under circumstances which rendered the procurement of a license impossible.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

*M. V. Gannon*, for plaintiff in error.

*George H. Hastings, Attorney General*, for the state.

RAGAN, C.

Fred Hunzinger was indicted in the district court of Douglas county for selling intoxicating liquors without having first procured a license therefor. Hunzinger pleaded guilty to the indictment, and the state put on record an admission that the sale was made within two miles of the corporate limits of the city of Omaha, in said county, but not within the limits of any incorporated city or village. Hunzinger then filed a motion in arrest of judgment, alleging that the statute on which the indictment was predicated was unconstitutional. The court overruled this motion and sentenced Hunzinger to pay a fine of \$300 and costs, from which judgment Hunzinger comes here on error.

Section 1, chapter 50, Compiled Statutes, 1893, provides: "The county board of each county may grant license for the sale of malt, spirituous and vinous liquors, if deemed expedient; \* \* \* *Provided*, Such board shall not have power to issue any license for the sale of any liquors in any city or incorporated village, or within two miles of the same; *Provided*, In counties having 150,000 inhabitants the county commissioners may also issue licenses within two miles of any city in said county." The provisions in the section just quoted are the ones said to be obnoxious to the constitution. The contention is that the second proviso is obnoxious to article 3, section 15, which provides that the legislature shall not pass special or local laws in certain named cases. It is argued that the second proviso of the section is special legislation, within the meaning of the constitution quoted above, as it assumes to regulate county and township offices. We are cited to no authority to support this contention, nor do we think any could be found. It must suffice to say, that, in our opinion, the proviso of

the statute is not obnoxious to the constitutional provision above quoted on that ground. Another objection to this second proviso is that by its terms it applies and can only apply to Douglas county and for that reason is special or class legislation. In *McClay v. City of Lincoln*, 32 Neb., 412, a law which exempted cities of the state from giving an appeal bond in actions appealed by them from the courts was held not to be obnoxious to the constitutional provision above, as being special legislation, the court holding that a law framed in general terms, restricted to no locality and operating equally upon all of a group of objects, was not a special law. In *State v. Graham*, 16 Neb., 34, this court held that classification of the cities of the state into classes and sub-classes, and the conferring upon them of powers of a general nature by act of the legislature, the provisions of which act were applicable to but one of such classes or sub-classes of cities, was not repugnant to any provision of the constitution. It is not thought that the decision of the court would have been different had the law, considered in the case last cited, been made applicable to cities having certain populations without designating them as of any class.

Section 12, chapter 2, Compiled Statutes, 1893, provides: "Whenever twenty or more persons, residents of any county in this state, shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the state board of agriculture, and shall have appointed the usual and proper officers, and when the said society shall have raised and paid into the treasury, by voluntary subscription or by fees imposed upon its members, any sum of money, in each year not less than \$50, and whenever the president of such society shall certify to the county clerk the amount thus paid, it shall be the duty of the county board of said county to order a warrant drawn on

the general fund of said county in favor of the president of said society for a sum equal to three cents on each inhabitant of said county, upon a basis of the last vote for member of congress, allowing five inhabitants for each vote thus cast, and it shall be the duty of the county board of said county to include this three cents per capita in their annual estimate, and it shall be the duty of the treasurer of the county to pay the same out of the general fund." \* \* \* An agricultural society in Custer county, having complied with this statute, requested the board of supervisors of said county to include the three cents per capita in their annual estimate of expenses for the year 1892. The supervisors refused to do this, and the agricultural society applied to this court for a *mandamus* to compel them to perform the request. Mr. Justice Post, delivering the opinion of this court in the case (*State v. Robinson*, 35 Neb., 401), said: "It is urged as an objection to the law that it contravenes section 15, article 3 of the constitution, which provides: 'The legislature shall not pass local or special laws \* \* \* granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever.' We are unable to perceive wherein the law is susceptible of such a construction. The limitation contained in the above section of the constitution was evidently intended as a remedy for the evil of special legislation, and cannot, by any reasonable or natural construction, be held to apply to the act under consideration. It has been frequently held by this court that a law which is general and uniform throughout the state, and operates alike upon all persons or localities which come within the relations and circumstances provided for, is not objectionable to the constitution or wanting in uniformity." The proviso of the statute assailed in this case as unconstitutional is uniform in its application to all counties of the state having 150,000 inhabitants, and is not special or class legislation, because at the time the

act went into effect there was but one county in the state to which it applied.

It is also argued that the first proviso in said section 1 is unconstitutional because it arbitrarily prohibits the sale of intoxicating liquors within the radius of two miles of all the cities and villages in the state situated in counties not having 150,000 inhabitants. This proviso was passed upon by this court in *Pleuler v. State*, 11 Neb., 547, and declared to be constitutional. With the reasoning and the conclusion in that case we are entirely satisfied. We are urged by the counsel for plaintiff in error to declare this first proviso unconstitutional, because counsel says that the residents and citizens within two miles of the cities and villages of the state, in counties not having 150,000 inhabitants, by reason of this law are deprived of the rights and privileges of other citizens of the state. This is a political argument which should be addressed to the legislature; and, if so addressed by those citizens of the state whose rights and privileges, it is said, are denied, would doubtless be heeded. This argument, to say the least, is remarkable; and, so far as we know, is the first record of a willingness intimated by the traffickers without license in intoxicating drinks to immolate themselves upon the altar of liberty to protect the rights and privileges of the citizen from the encroachments of a tyrannical legislature. But this argument—if it is not undignified to say so—reminds us of the complaint made by the wolf to the farmer because the shepherd refused the lambs the right and the privilege of grazing in the woods instead of in the pastures.

Section 11 of said chapter 50 provides: "All persons who shall sell or give away upon any pretense, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor." And we agree with the honorable the attorney general that this

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Shannon v. State.

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proceeding in error is entirely without merit. If the act assailed as unconstitutional were so, the judgment would still have to be affirmed. It would be no defense to the plaintiff in error for selling liquor in this state without a license that he made such sale at a time or place or under circumstances which rendered it impossible for him to procure a license to make such sale. (*Kadghin v. City of Bloomington*, 58 Ill., 229 ; *State v. McNeary*, 88 Mo., 143.)

Under any view of the case that may be taken, the judgment of the district court was right and the same is

AFFIRMED.

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FRANK SHANNON V. STATE OF NEBRASKA.

FILED MARCH 6, 1894. No. 5353.

**Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.** On the authority of *Hunzinger v. State*, 39 Neb., 653, the judgment in this case is affirmed.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

*M. V. Gannon*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, 39 Neb., 653, and on the authority of that case the judgment of the district court is

AFFIRMED.

**ERNEST SOEHL V. STATE OF NEBRASKA.**

FILED MARCH 6, 1894. No. 5354.

**Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.** On the authority of *Hunzinger v. State*, 39 Neb., 653, this case is affirmed.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

*M. V. Gannon*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, 39 Neb., 653, decided at this term, and on the authority of that case the judgment of the district court is

**AFFIRMED.**

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**JOSEPH ROWELS V. STATE OF NEBRASKA.**

FILED MARCH 6, 1894. No. 5355.

**Intoxicating Liquors: LICENSE: CONSTITUTIONAL LAW.** On the authority of *Hunzinger v. State*, decided at this term, and reported in 39 Neb., 653, the judgment in this case is affirmed.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

*M. V. Gannon*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

Violet v. Rose.

RAGAN, C.

The facts in this case and the law applicable thereto are the same as in *Hunzinger v. State*, decided at this term, and reported in 39 Neb., 653, and on the authority of that case the judgment of the district court is

AFFIRMED.

39	660
43	100
43	441
39	660
44	403
39	660
45	451
39	660
47	928

## JOHN M. VIOLET v. H. F. ROSE.

FILED MARCH 6, 1894. No. 5513.

1. **Negotiable Instruments: BONA FIDE HOLDER: DEFENSES: BURDEN OF PROOF.** It seems that in an action by an indorsee of a promissory note against the holder, where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value, but that, where the defense pleaded is failure of consideration, the burden is upon the defendant to show that the plaintiff did not pay value for the note, or that he took it with notice.
2. ———: ———: ———: ———. Accordingly, where a defendant in such a case pleads both fraud and failure of consideration, it is not error for the trial court to permit the introduction of evidence as to the transactions between the original parties before the defendant has by evidence attacked plaintiff's *bona fides*, especially in view of the rule that the order in which proof shall be introduced rests within the discretion of the trial court.
3. **Trial: SURPRISE: WITHDRAWAL OF JUROR.** Where, upon a trial, a party is taken by surprise by the admission or exclusion of evidence, the trial court may permit the withdrawal of a juror and continue the case; but the propriety of such action rests within the sound legal discretion of the trial judge.
4. ———: ———: ———. Where the pleadings notify the party seeking the continuance of the character of the evidence which his adversary will offer, and where no reason is shown for his not being prepared to meet such evidence, except his reliance upon an issue of law arising upon the trial, which is determined against him, it is not error for the trial court to refuse permission to withdraw a juror and continue the case.

5. **Instructions: HARMLESS ERROR.** The submission incidentally to the jury in the course of an instruction of a fact admitted by the pleadings is not prejudicially erroneous, where the instructions, taken as a whole, do not place the existence of that fact before the jury as a controverted issue, and where, upon a review of the instructions and the evidence, it appears that the jury could not have been misled. *Dayton v. City of Lincoln*, 39 Neb., 74, distinguished.
6. **Conveyance of Homestead.** In order to convey a homestead, the instrument of conveyance must be signed and acknowledged by both husband and wife.
7. **Review: VOLUNTARY STATEMENT BY WITNESS.** Consideration will not be given in this court to an assignment of error based upon the admission in evidence of a statement by a witness not responsive to the question he was answering, although such question was objected to, unless by a motion to strike out that portion of his answer, or otherwise, the trial judge was given an opportunity to rule upon the particular testimony, the admission of which is assigned as error.
8. **Handwriting: HOW PROVED: COMPETENCY OF EXPERT WITNESS.** Where the genuineness of a signature is in controversy, a witness may testify as to his opinion upon the subject, where his knowledge of the disputed handwriting is not derived from ever having seen the person write, but where he has addressed that person a letter, received a letter in answer thereto coming from another post-office than the one to which his letter was addressed, and where further correspondence has ensued because of such letter, and acts have been performed showing that the person whose handwriting is in controversy has acted upon the letters as genuine.
9. **Transfer of Vendee's Interest in Contract for Sale of Real Estate.** In order to transfer the interest of a vendee in an executory contract for the purchase of land it is only necessary that there should be a memorandum in writing signed by the person to be charged; neither attesting witness nor acknowledgment is necessary as between the parties.
10. **Damages: BREACH OF CONTRACT TO CONVEY REAL ESTATE.** The measure of damages in favor of a vendee of real estate against a vendor who delays performance, but who ultimately conveys, the vendee accepting the conveyance, is the difference between the value at the time the conveyance should have been made and the value when it was made; but where the vendor has in the meantime kept the vendee out of possession, to the

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damage thus ascertained should be added the rental value of the property during the period of delay.

11. ———: ———: **LOSS OF PROFITS ON RESALE.** The profit which would have been made through a bargain for the resale of the property pending a delay is not an element of damages, at least where at the time of the contract the vendor did not know that the vendee was purchasing for the purpose of a resale.

**ERROR** from the district court of Lancaster county. Tried below before HALL, J.

The facts are stated by the commissioner.

*Abbott, Selleck & Lane*, for plaintiff in error:

Denial of plaintiff's request to withdraw a juror was such an abuse of discretion as entitles plaintiff to a new trial. (Maxwell, Pleading & Practice, 429; *People v. Judges*, 8 Cow. [N. Y.], 126.)

Defendant was not qualified as an expert to testify to the handwriting of Mrs. McCurday. (*Rogers v. Ritter*, 12 Wall. [U. S.], 321.)

The admission in evidence of a letter purporting to be written by Mrs. McCurday, without proof of signature, was error. (*Gartrell v. Stafford*, 12 Neb., 545.)

The measure of damages for breach of a contract to convey real estate is the difference between what defendant agreed to pay for the land and its real market value at the time the breach was made. (*Wasson v. Palmer*, 13 Neb., 378.)

Profits that could have been made on a resale of the land by the vendee are not proper elements of damage, and it was prejudicial error to admit proof thereof. (1 Sutherland, Damages, 114, 116; *Markel v. Moudy*, 11 Neb., 218.)

Under the evidence the McCurdays had no homestead right in the lots in question, and defendant cannot set up such claim to defeat the contract of conveyance. A home-

stead right is a personal privilege. It may be claimed or it may be waived. If claimed, it could only extend to two lots. (Sec. 1, ch. 36, Comp. Stats.; *Rector v. Rotton*, 3 Neb., 171; *Gallagher v. Smiley*, 28 Neb., 194.)

Proof as to the consideration for the note was not admissible till after the holder was shown to have taken with notice of defense. (*Smith v. Columbus State Bank*, 9 Neb., 31.)

*J. R. Webster, M. B. Reese and Halleck F. Rose, contra:*

The denial of plaintiff's request to withdraw a juror was right, because there was no proof or showing of surprise; defendant's answer apprised plaintiff of the character of evidence he would be required to meet; plaintiff had opportunity, on motion for new trial, to make showing of surprise and existence of newly-discovered evidence, and failed to do so; and it would have been improper to have permitted the exercise of this right as a mere pretext for a continuance. (Secs. 314, 317, Code; Maxwell, Pleading & Practice, 429, 430.)

The order in which proof may be admitted is discretionary with the trial court. At what stage in the trial any material fact is proved is immaterial if all the other necessary facts are afterwards proved. (*Goodman v. Kennedy*, 10 Neb., 270; *Ponca v. Crawford*, 18 Neb., 551.)

The indorsement in this case was by a contract *in extenso* in the form of an assignment written on the back of the note. The contract was not the implied contract of indorsement, and the holder was not entitled to be protected under the law merchant as a *bona fide* indorsee. (*Aniba v. Yeomans*, 39 Mich., 171; *Lyons v. Divelbis*, 22 Pa. St., 185; *Hailey v. Falconer*, 32 Ala., 536.)

The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. (Sec. 4, ch. 36, Comp. Stats.; *Cobbey v. Knapp*, 23 Neb., 579; *Phillips v. Bishop*, 31 Neb., 853.)

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Violet v. Rose.

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The profit which vendee could have made on a resale is a proper element of damage. (1 Sutherland, Damages, 130; *Drake v. Baker*, 34 N. J. Law, 358; *Engell v. Filch*, 3 L. R., Q. B. [Eng.], 314.)

IRVINE, C.

The plaintiff in error sued the defendant in error upon a promissory note dated April 9, 1889, and alleged to have been made and delivered by the defendant to Hiram M. McCurday, and payable to his order one year after date. Plaintiff alleged that on October 22, 1889, McCurday indorsed the note as follows: "I hereby assign the within note to John M. Violet and authorize him to collect the same. H. M. McCurday," and delivered the note to plaintiff. Rose answered substantially as follows:

First—Denying the indorsement and alleging that McCurday was the owner and the real party in interest.

Second—That whatever interest plaintiff had in the note he acquired with full notice of all the facts, and not in the usual course of business, for value before maturity.

Third—That upon April 9, 1889, defendant executed the note for delivery, upon receipt from McCurday, of a deed of assignment, executed and acknowledged by himself and Catherine McCurday, his wife, conveying to defendant all their interest in certain land in the city of Lincoln, being then their homestead, and that on said day McCurday fraudulently, and without consideration, presented to the defendant a deed of assignment with the names Hiram McCurday and Catherine J. McCurday signed thereunto as apparent grantors, and fraudulently represented to plaintiff that Catherine McCurday had executed the same, that it was her own signature thereunto written, and that she would personally appear next morning before a notary public and make formal acknowledgment of such instrument; and that, relying upon such representations, defendant delivered the note to McCurday; whereas, in fact,

said signature of Catherine McCurday was a forgery, and Catherine McCurday never did acknowledge the instrument, and that defendant took nothing by said instrument, and plaintiff retained possession of the premises until December 1, 1889; that upon December 1, 1889, the said McCurday transmitted to the defendant a quitclaim deed to said premises, but without attesting witnesses, and that during the delay, and while the conveyance was wrongfully withheld, the incumbrance, because of accruing interest, delinquent taxes, and cost of a foreclosure action brought against the McCurdays, so increased that the defendant was compelled to pay by reason of such increase \$950, being the whole amount for which the note was given. The answer further averred that the contract of sale was made with a view to a present conveyance, and, as McCurday knew, in order that defendant might resell at a profit; that defendant afterwards secured purchasers for said land at a profit to himself of \$1,000, but was unable to convey because of the delay of the McCurdays in conveying title, and that since receiving the quitclaim deed the premises have not been salable at all by reason of the pending foreclosure suit.

The averments of the answer were met by a general denial.

A verdict was returned for defendant and judgment entered thereon from which plaintiff prosecutes error.

1. The defendant claimed and was conceded the right to open and close, whereupon the defendant himself was sworn and was almost immediately asked what was the consideration of the note. This was objected to for the reason that such evidence was inadmissible until it should be first established that the plaintiff was not a *bona fide* holder. This objection was overruled and the defendant permitted to go into the transaction between himself and the McCurdays. Several assignments of error relate to this class of testimony.

It is a universal principle that in the absence of any attack upon the validity of a negotiable instrument, as between its original parties, the holder bringing the action upon it is presumed to be a *bona fide* holder for value. When, however, the holder or acceptor in an action against him upon the instrument sets up matter in defense which would constitute a valid defense were the action brought by the original payee, it is frequently a question of difficulty as to where the burden of proof lies upon the issue of *bona fides*. The writer is unable to perceive why, upon different defenses, there should be any distinction as to the burden of proof upon that issue, whatever the defense pleaded. It may be urged upon one side that the policy of the law merchant, in favoring the free negotiation of bills and notes, demands that the maker, in order to defend against an indorsee, should prove affirmatively that such indorsee is not a *bona fide* holder for value, and to this argument there may be added that the plaintiff in such a case has already in his favor a presumption of *bona fides*, and that no evidence of a defense growing out of transactions between the original parties has a natural tendency to rebut such presumption; but, upon the other hand, whatever may be the fundamental defense, it would seem that the proof of a *bona fide* purchase for value before maturity lies peculiarly within the possession of the plaintiff; that such facts are always easily susceptible of proof by him, whereas proof of *mala fides*, or want of consideration, even where the facts exist, is frequently beyond the knowledge or reach of the defendant. These arguments upon either side apply with equal force, whatever may be the fundamental defense, but unfortunately the courts have drawn distinctions between defenses. The numerous decisions disclose a general tendency to cast the burden of *bona fides* upon the plaintiff where illegality of consideration or fraud is alleged, and in other cases, to cast the burden of showing notice or want of consideration upon the defendant. But

even the test suggested by this general tendency of authorities is not trustworthy, for the classification thus resorted to has not been strictly recognized, and possibly it has not been absolutely observed by the courts of any state. While this confusion of authorities is to be regretted, the distinctions referred to, whether well or ill-founded, have been recognized everywhere, and our own decisions probably approach the general classification referred to as nearly as those of any state. Thus, it has been held that where usury is established, the burden is upon the plaintiff to show *bona fides*. (*Wortendyke v. Meehan*, 9 Neb., 221; *Olmsted v. New England Mortgage Security Co.*, 11 Neb., 487; *Darst v. Backus*, 18 Neb., 231; *Sedgwick v. Dixon*, 18 Neb., 545; *Cheney v. Janssen*, 20 Neb., 128; *Knox v. Williams*, 24 Neb., 630; *Lincoln Nat. Bank v. Davis*, 25 Neb., 376; *Blackwell v. Wright*, 27 Neb., 269; *Richardson v. Stone*, 28 Neb., 137; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847; *Colby v. Parker*, 34 Neb., 510.) So also where the evidence established the theft of a note payable to bearer. (*Hooper v. Browning*, 19 Neb., 420.) So, too, where fraud in the inception of the note is proved. (*Haggland v. Stuart*, 29 Neb., 69.) On the other hand, where the defense was in the nature of failure of consideration, and the plaintiff, as a part of his case in chief, had introduced evidence tending to show a *bona fide* purchase, it was held that no testimony in support of the fundamental defense was proper, unless the defendant introduced evidence tending to show that the plaintiff was not a *bona fide* purchaser. (*Western Cottage Organ Co. v. Boyle*, 10 Neb., 409.) In *Cannon v. Canfield*, 11 Neb., 506, the inference is that where want of consideration is shown the burden is also upon the maker to prove notice to the indorsee. The same inference is to be drawn in case of failure of consideration, from *Citizens Bank v. Ryman*, 12 Neb., 541. But a contrary inference might be drawn from a closing paragraph of the opinion in *Fifth Nat. Bank of New York City*

*v. Edholm*, 25 Neb., 741. In *Coakley v. Christie*, 20 Neb., 509, it was distinctly decided that in the case of a note given in payment of a piano sold with a warranty, evidence of the fundamental defense was properly excluded, for the reason that there was no tender made of proof that the plaintiff was not an innocent purchaser.

It would seem from this review of the authorities that the defendant, where fraud is pleaded, makes out his case simply by proof of the fraud, and that the plaintiff must affirmatively establish *bona fides*; but that where the defense is failure of consideration the defendant must establish both failure of consideration and *mala fides* on the part of the plaintiff, or the fact that he was not a purchaser for value. Now, in the case before us, the defendant pleaded both fraud and failure of consideration. When he opened his case the situation was this: Should he succeed in showing that the instrument of assignment brought to him by McCurday, purporting to be signed by both McCurday and wife, did not in fact bear Mrs. McCurday's genuine signature, and that the note was procured through the representation that such signature was genuine, then fraud would be established, and it would lie with the plaintiff to show his *bona fides* in the purchase of the note. If, on the contrary, the proof of this defense should fail, but the defendant should succeed in showing that he failed to obtain the property in question because Mrs. McCurday refused or failed thereafter to acknowledge the instrument, then there would be merely a failure of consideration, and the defendant, to prevail, would be required to attack plaintiff's *bona fides*. The burden of proof, therefore, depended upon the evidence introduced upon these issues. The order of proof rests within the discretion of the trial court. (*Consaul v. Sheldon*, 35 Neb., 247.) The court, therefore, did not err in allowing evidence of the fundamental defense to be introduced before evidence was offered as to the good faith of the purchaser. The court instructed

the jury that the burden of proof was upon the defendant upon this issue, so there was nothing in this procedure of which the plaintiff can complain.

2. When the court ruled that the defendant might introduce evidence going to the consideration without first attacking plaintiff's *bona fides* the plaintiff asked leave to withdraw a juror and continue the case. This motion was overruled. The granting or refusing leave to withdraw a juror rests largely within the discretion of the trial court. The object of that procedure is to prevent a failure of justice where a party has been taken by surprise by his opponent's evidence or the exclusion of his own. In *People v. Judges of New York City*, 8 Cow. [N. Y.], 126, it was held that such leave should be given where a party was prevented by accident or mistake from making out his case or establishing his defense; but in *Chandler v. Bicknell*, 5 Cow. [N. Y.], 30, it was held that such practice was improper where there was merely a failure of proof. The surprise which justifies a trial court in permitting the withdrawing of a juror must not be due to the negligence of the party in preparing his case. Here by the answer the plaintiff was distinctly and specifically notified of the defense sought to be introduced. If he had evidence to meet that defense he should have been prepared with it at the trial, and had no right to rely upon the theory that the court would hold that the defendant must first attack plaintiff's *bona fides* and that defendant would be unable to successfully do so, and then, finding himself mistaken in this theory, ask for a continuance. The specific reason given for the motion was that it became necessary for him to take the depositions of the McCurdays. The deposition of the plaintiff was offered in evidence, and from that it appears that he and the McCurdays were then living in the same town. No reason is advanced for not taking their depositions as well as the plaintiff's.

3. By the first instruction the court instructed the jury

as follows: "If the jury believe from the evidence that the defendant made the note in question, then, under the issues joined in this case, the defendant assumes the burden of proving by a preponderance of the evidence not only that the consideration of the note had failed in whole or in part as alleged in his answer, and that he is entitled to the offsets therein pleaded, but also that the plaintiff took the said note after it became due, or if before due, without paying any consideration therefor, or that he had notice of the alleged defenses at the time said note was assigned to plaintiff, if the evidence shows that it was assigned to plaintiff." The execution of the note was admitted, and it was therefore erroneous to submit the question of its execution to the jury. Was the error prejudicial? In *Dayton v. City of Lincoln*, 39 Neb., 74, decided at the present term, it was held to be prejudicially erroneous to submit to the jury issues arising from the pleadings in support of which there stands uncontradicted sufficient competent evidence, where the effect of submitting such issues may be to mislead the jury and withdraw its attention from the controverted issues. In this case we do not think the instruction quoted could have had any such effect. The statement was not the principal object of the instruction, but was merely incidental to other propositions. The other instructions, instead of emphasizing the false issue, as was the case in *Dayton v. City of Lincoln*, 39 Neb., 74, rather assumed the facts according to the pleadings. Under the circumstances we do not think the error was prejudicial.

4. Error is assigned upon the court's permitting the witness Stewart to testify in general terms that the property was the homestead of the McCurdays. This testimony appeared in a long answer given by him in response to an inquiry as to what negotiation he had entered into with defendant for the purchase of the property. A general objection was introduced to this question, which will be hereafter noticed. The statement that the property was a

homestead was interjected in the course of this answer. It was not pertinent to the question asked, no special objection was interposed to it, there was no motion to strike it out, and the trial court was given no opportunity to rule upon this special testimony. The assignment cannot, therefore, be considered. There is ample proof elsewhere in the record, uncontradicted, that the property was the homestead of the McCurdays and was by them occupied as such until long after the note was given.

5. Objections are made to the giving and refusal of instructions relating to the indorsement of the note to plaintiff. The form of the indorsement has been already stated. The plaintiff contends that the instructions given by the court left to the jury to determine whether the language upon the note amounted to an indorsement, and that the instructions asked by plaintiff and refused correctly charged the jury that such language constituted an indorsement. The instructions bearing upon this question are too long to quote. That asked by plaintiff and refused is objectionable because it added to the statement that the language constituted an indorsement the further statement that it vested the title and ownership of the note in the assignee. To have given it would have misled the jury, because it would be inferred therefrom that the defendant could not attack the transfer by showing that it was made without consideration and for the purpose only of maintaining an action as an indorsee. The instructions given upon the subject we do not think bear the construction that the plaintiff puts upon them. The instructions distinctly told the jury what constituted a *bona fide* holder for value of negotiable paper and what are his rights, and submitted to it the question as to whether or not the plaintiff was such a *bona fide* holder under the evidence in the case. All assumed, although not in so many words stating, that the assignment upon the note was sufficient in form to enable the plaintiff to claim under it as a *bona fide* holder for

value. The instructions related, not to the form of the indorsement, which was assumed to be sufficient, but to the evidence in regard to Violet's ownership. Upon this subject the only evidence was of Violet himself, who says in direct examination, referring to McCurday: "I had a trade with him; gave him money; traded stock and merchandise and chattels." Upon cross-examination he says: "I got possession of said note in a legal, *bona fide* way, in the usual way of business." He also says that he paid McCurday no money, that he let him have property at a fair cash value, but the property, to-wit, "stock and merchandise," had not yet been delivered to McCurday and was only to be delivered when the note should be collected. It is doubtful whether upon this evidence a finding that plaintiff was a *bona fide* holder for value could have been sustained. He was not a holder for value as he had yet parted with nothing, and unless the note should ultimately be collected he was never to give anything for it. He does not say what the stock and merchandise, which he had agreed to give in case of the collection of the note, is, or how much of it he was to give. When the court upon this evidence left to the jury the question of *bona fides* it certainly did all that plaintiff could ask.

6. The defendant was allowed to testify that in his opinion the signature of Mrs. McCurday to the assignment of the contract was not genuine. The admission of this evidence is assigned as error. The proof shows that defendant had never seen Mrs. McCurday write, but he had sent her a letter which he says he thinks was addressed to Scotia, Ohio, and had received a letter in answer thereto which is in evidence. This letter is dated and postmarked "Otsego, Ohio, October 25." It contains a proposition by Mrs. McCurday to sign a relinquishment in consideration of the prompt payment of the \$950 note. On November 20 the defendant addressed both the McCurdays, this time to Scioto, Ohio, enclosing for execution a quitclaim deed for the prop-

erty, which, on November 24, was returned with an indorsement apparently written by McCurday stating that the deed was enclosed, and there was enclosed therein a deed of quitclaim signed and acknowledged by both Mr. and Mrs. McCurday. The plaintiff in his deposition testifies that subsequently Mrs. McCurday stated to him that she had conducted such a correspondence with the defendant. It will be observed that while the letter from Mrs. McCurday did not come from the post-office to which defendant's letter was sent, nevertheless it was followed by other correspondence and was acted upon by her. This was sufficient proof of genuineness to support the defendant's testimony. The rule is thus stated by Patteson, J., in *Doe v. Suckermore*, 5 Ad. & E. [Eng.], 703: "The knowledge [rendering a witness competent to give his opinion as to the genuineness of a writing] may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the parties upon the contents of those letters or documents, or, having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party." The proof in the case before us brings it directly within this rule, which is adopted by Greenleaf *in totidem verbis* (1 Greenleaf, Evidence, 577), and which has been frequently recognized in this country. (*Commonwealth v. Carey*, 19 Mass., 47; *Johnson v. Daverne*, 19 Johns. [N. Y.], 134; *Pinkham v. Cockell*, 77 Mich., 265.) The weight of such evidence must be very slight, but it is competent, and the credit to be given it is for the jury.

7. Another group of assignments of error relates to the evidence and instructions in regard to the attempted conveyances of the land and the measure of damages on behalf of the defendant. Recurring to the evidence upon these subjects, we find it clearly established that McCurday's interest was under a contract of sale assigned to him by the original vendee; that he was in possession and was occupying the premises as a homestead. In order to convey a homestead the instrument of conveyance must be executed and acknowledged by both husband and wife (Comp. Stats., ch. 36, sec. 4; and a court of equity will not decree the specific performance of a contract for the sale of a homestead unless the contract be executed and acknowledged by both husband and wife. (*Larson v. Butts*, 22 Neb., 370; *Clarke v. Koenig*, 36 Neb., 572.) It is undisputed that Mrs. McCurday did not acknowledge the instrument whereby McCurday undertook to assign his interest in the premises and contract to the defendant. No rights in the premises were, therefore, vested in the defendant under that assignment, and there was really no delivery of the assignment, such as it was. It was merely left with the defendant until Mrs. McCurday should come and acknowledge it, and the defendant gave plaintiff the note, relying upon his promise that such acknowledgment would be made. It was not made, and the defendant seems to have persistently endeavored to procure a proper conveyance for many months, finally receiving an instrument in form of a quitclaim deed. This was executed in Ohio and has no attesting witness. The certificate of acknowledgment has no county named in the venue, and it is at least doubtful whether that defect is supplied elsewhere in the certificate. It is probable, therefore, that no presumption attaches that the deed was executed in accordance with the laws of Ohio. But McCurday had no legal estate in the premises. What he undertook to convey was his rights under the executory contract for the purchase of the land. The property had by that time been

abandoned as a homestead, the McCurdays having permanently removed to Ohio, and a formal deed would not be necessary to transfer their interest as executory vendees. It is not necessary to here decide whether a deed having no attesting witness is sufficient to pass the legal title as between the parties thereto. The quitclaim deed, signed by the parties without witness or acknowledgment, was a sufficient memorandum to satisfy the requirements of the statute of frauds, and operated to transfer to the defendant in December what the plaintiff had undertaken to transfer in April. (*Missouri Valley Land Co. v. Bushnell*, 11 Neb., 196; *Blazier v. Johnson*, 11 Neb., 404.) The defendant seems to have objected at the time to the form of this conveyance, but he retained it; and while it does not appear clearly whether he ever was in possession of the premises, he acted upon the conveyance and subsequently sold his interest to a third person.

The defendant upon the trial proceeded upon the theory that he was entitled to set off against the note for the purchase money losses he sustained by reason of inability to carry out arrangements made for the resale of the land at a profit. He also undertook to set off expenses incurred in the way of interest upon incumbrances and taxes. Evidence was introduced tending to show that between April and December he had completed arrangements for selling the land at a considerable profit; that these arrangements fell through because of his inability to make title, and that in December, when he procured the quitclaim deed, persons holding the incumbrance had instituted an action to foreclose, and that because of the pendency of that proceeding he was unable then to sell; that he subsequently did dispose of the land, but the condition of the incumbrances was such that he obtained nothing out of the proceeds.

The instructions given by the court upon the measure of damages are couched in general terms, and, so far as they go, are free from objection; but the evidence referred to

was all objected to and its admission is assigned as error. The instructions of the court left the jury free to consider it. We do not think it was directed to the proper measure of damages in such a case. There is no evidence that, at the time the sale was made and the note delivered, McCurday knew that Rose was buying for the purpose of a resale. There is only evidence that McCurday suggested that the property might shortly afterwards be sold at a profit. There is no evidence that Rose then had a purchaser secured. It is shown that McCurday was afterwards informed that a portion of the land had been contracted to be sold, but applying the rule in *Hadley v. Baxendale*, we do not think that the loss of a prospective sale of the premises pending the delay was such a loss as can be considered as arising naturally from the breach of contract or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach.

It has been held that in the case of the breach of an executory contract to convey real estate, where the vendor having title refuses or puts it beyond his power to convey and no part of the consideration has been paid, the measure of damages is the value of the land at the time the contract should have been performed less the contract price. (*Wasson v. Palmer*, 13 Neb., 376; *Carver v. Taylor*, 35 Neb., 429. See, also, *Dunshee v. Geoghegan*, 7 Utah, 113; *Muenchow v. Roberts*, 77 Wis., 520; *Pumpelly v. Phelps*, 40 N. Y., 59; *Allen v. Atkinson*, 21 Mich., 351; *Hopkins v. Lee*, 6 Wheat. [U. S.], 109.) The general principle of all these cases is that which controls the whole subject of damages in this state, to-wit, that actual fair compensation should be made. In *Sweem v. Steele*, 5 Ia., 352, it was held that the vendee should recover any increased value to the land to the time when the contract should have been performed. Applying the rule to this case, if there had been an enforceable executory contract made providing for a convey-

ance immediately thereafter and McCurday had refused to convey, Rose could have recovered only the difference between the value of the land at that time and the purchase price agreed upon. If his contract had been to convey in December and he had then refused to do so, the measure of damages would have been the difference between the value in December and the contract price. He accepted the conveyance in December, and following the analogy of the cases where there has been a refusal to convey, and applying the rule there laid down to this case, which amounts simply to a delay in the conveyance, the measure of damages would be the difference between the value of the land in April when it should have been conveyed, and its value in December when it was conveyed. If the defendant was kept out of possession during these months, it would seem that the rental value of the land in the meantime should be added to the damages thus ascertained. There was no foundation in the evidence admitted for ascertaining the damages according to this rule, and the evidence which was admitted was directed to a false measure of damages.

In support of the rule of damages contended for by defendant we are cited to 1 Sutherland, Damages, 130; *Drake v. Baker*, 34 N. J. Law, 358; *Engel v. Fitch*, L. R. 3 Q. B. [Eng.], 314; s. c., L. R. 4 Q. B. [Eng.], 659. Sutherland, at the place cited, lays down the proposition that a party injured by total breach is entitled to recover the profit of a particular contract which he shows with sufficient certainty would have accrued if the other party had performed. Here there was no total breach, merely delay. Sutherland cites a vast array of cases, but all of them, so far as we have been able to examine them, simply state the general rule of damages; *Hadley v. Baxendale*, 9 Exch. [Eng.], 341, being among the number and affording a fair illustration of the general principles from which Mr. Sutherland has sought to deduce this particular rule. *Drake v. Baker*, *supra*, simply holds that the case of *Flureau v.*

*Thornhill*, 2 Wm. Bl. [Eng.], 1078, does not apply to the case of a failure to make title because of the wife's refusing to join in the deed, and that substantial damages may be in such case recovered, but no rule is laid down for determining those damages. In *Engel v. Fitch*, *supra*, it was certainly held that a vendee was entitled to recover the profits which he would have made upon a particular sale negotiated by him, and this was allowed upon the principle that the possibility of a resale is not beyond the contemplation of the parties, and that such damages came within the rule of *Hadley v. Baxendale*, *supra*. But upon appeal in exchequer chamber (L. R. 4 Q. B. [Eng.], 659) this judgment was affirmed, not upon this ground, but upon the ground that the measure of damages was the difference between the purchase price and the value at the time of the breach. This is clear from the following language: "If the contract had been carried out he would have been possessed of property of the increased value of 105 pounds. It follows that he is entitled to damages to that amount. Not, I repeat, because he happens to have made such a good bargain of resale, but because, as the case is put before us, we must take this bargain as evidence of the market value, no contrary evidence having been given." This case supports the view we have taken, but the portion of it making the purchase price at the resale evidence of market value is not applicable to the case before us, for here the defendant's bargain of resale was made during the period of delay and afforded no criterion as to the market value at the time title was made. It may then have been much greater, in which case defendant would suffer no damage; and the mere fact that a foreclosure suit, in which defendant then obtained a right to redeem, was pending, and that fact prevented a resale at that time, does not go to the market value.

REVERSED AND REMANDED.

SINGER MANUFACTURING COMPANY V. CHARLES R.  
FLEMING.

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FILED MARCH 6, 1894. No. 5662.

1. **Constitutional Law: WAGES OF LABORERS.** The act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business, Laws of 1889, chapter 25, is not in conflict with the constitution of Nebraska, either as being broader than its title or as being prohibited class legislation.
2. ———: ———: **DAMAGES.** Nor does the act seek to impose a penalty for the benefit of an individual. The recovery provided for in the act, of the debt, costs, expenses, and attorney's fee, is simply a recovery of compensatory damages and not a penalty.
3. ———. Whether the act is valid, in so far as it makes its violation a crime, is not decided; that portion of the act not being so connected with the rest as to affect the validity of the whole act.
4. ——— Nor is the act in conflict with section 1 of article 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.
5. **Garnishment of Wages in Other States: FOREIGN CORPORATIONS.** A foreign corporation, having a place of business in Nebraska, which institutes, in another state, attachment proceedings and seizes the earnings of a citizen of Nebraska, exempt under the laws of Nebraska, is subject to the operation of the act; the contract out of which the proceedings arose having been made in Nebraska and being here performable.
6. ———: ———: **EXEMPTIONS: CONFLICT OF LAWS.** While under the laws and decisions of Iowa a judgment in a proceeding by foreign attachment, whereby earnings of the defendant, a resident of Nebraska, earned in Nebraska and payable there, are seized and applied to the payment of the defendant's debt, must be treated as within the jurisdiction of the Iowa courts, still the *situs* of said earnings, for the purpose of determining the right to exemption, is Nebraska. *Mason v. Beebe*, 44 Fed. Rep., 558, followed.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

The opinion contains a statement of the facts.

*Breckenridge, Breckenridge & Crofoot*, for plaintiff in error:

The law upon which the judgment is based is unconstitutional because the act is broader than its title. The penalties provided in section 4 of the act are clearly beyond the scope of, and not indicated by the scope of, the title of the act. (Sec. 11, art. 3, Constitution; *White v. City of Lincoln*, 5 Neb., 505; *Ex parte Thomason*, 16 Neb., 238; *Messenger v. State*, 25 Neb., 674; *Touzalin v. City of Omaha*, 25 Neb., 817.)

The law is unconstitutional also because it imposes a penalty which is not contributed to the school fund. (Sec. 5, art. 8, Constitution; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, 45.)

The act is unconstitutional, as a vicious example of class legislation. (Sec. 15, art. 3, Constitution; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

The act, if valid, can have no application to persons or corporations not domiciled in Nebraska. Corporations are citizens and residents of the state, under the laws of which they were created, and cannot by engaging in business in another state acquire a residence there. (*Fales v. Chicago, M. & St. P. R. Co.*, 32 Fed. Rep., 673; *Insurance Co. v. Francis*, 11 Wall. [U. S.], 210; *Ex parte Schollenberger*, 96 U. S., 377; *Railroad Co. v. Kootz*, 104 U. S., 5; *Booth v. St. Louis Fire Engine Mfg. Co.*, 40 Fed. Rep., 1; *Bensinger Register Co. v. National Register Co.*, 42 Fed. Rep., 81.)

The judgment infringes upon the "full faith and credit" clause of the federal constitution. (Secs. 1, 2, art. 4, Constitution, United States; *Mooney v. Union P. R. Co.*, *Garnishee*, 60 Ia., 346; *Harwell v. Sharp*, 85 Ga., 124; *Jenks v. Ludden*, 27 N. W. Rep. [Minn.], 188; *Warner v. Jaf-*

*fray*, 96 N. Y., 248; *Green v. Van Buskirk*, 7 Wall. [U. S.], 139; *Cole v. Cunningham*, 133 U. S., 107; *Hervey v. Rhode Island Locomotive Works*, 93 U. S., 664; *Walworth v. Harris*, 129 U. S., 355; *Scudder v. Union Nat. Bank*, 91 U. S., 406.)

*Kennedy, Gilbert & Anderson, contra:*

Chapter 25 of Laws, 1889, is constitutional, the subject of the bill is fairly expressed in the title, and there is a compliance with the constitutional requirements. (*White v. City of Lincoln*, 5 Neb., 516; *People v. McCallum*, 1 Neb., 194; *State v. Ream*, 16 Neb., 683; *State v. Bush*, 45 Kan., 138; *State v. Barrett*, 27 Kan., 213.)

The law does not undertake to divert any fine from the school fund. The recoverable items, "costs, expenses, and attorney's fees," all fall properly within legitimate costs and damages when the statute allows their recovery. (*Winkler v. Roeder*, 23 Neb., 709; *Rich v. Stretch*, 4 Neb., 189; *Seidentopf v. Annabil*, 6 Neb., 524; *Heard v. Dubuque County Bank*, 8 Neb., 13; *Hand v. Phillips*, 18 Neb., 595.)

The judgment of the district court does not infringe on the "full faith and credit" clause of the federal constitution. The exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought. The *situs* of the debt will be deemed to be at the domicile of the wage-earner by whose labor the debt due him was created. (*Mason v. Beebee*, 44 Fed. Rep., 556; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 246; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 175; *Freeman*, Judgments, sec. 580.)

IRVINE, C.

The plaintiff in error is a corporation organized under the laws of the state of New Jersey. It has a place of doing business, styled a "general agency," at Denver, Colorado.

It has also agencies in Iowa and Nebraska, and does business in both of these states. The agents there report to the general agent at Denver. The defendant in error is a resident of Nebraska, the head of a family, and an employe of the Union Pacific Railway Company, whose lines extend into both Iowa and Nebraska. Fleming bought from the Singer Company a sewing machine upon credit. The agent of the Singer company in Omaha, after some efforts to collect the bill, returned it to the general agent at Denver, who in turn sent it to the agent in Council Bluffs, Iowa. The agent at Council Bluffs brought an action in Pottawattamie county, Iowa, against Fleming on behalf of the Singer Company, proceeding by process of foreign attachment and garnished the Union Pacific Railway Company. The result of this proceeding was that wages of Fleming to the amount of \$38.05, due him from the railroad company, were seized by the Iowa court and appropriated to the payment of the judgment there rendered against Fleming. Fleming then instituted this action in Douglas county, Nebraska, under sections 531c, 531d, 531e, and 531f of the Code of Civil Procedure to recover from the Singer Company the debt so garnished, with costs, expenses, and attorney's fees. The wages reached by garnishment were earned within sixty days prior to the commencement of the action in Iowa. Judgment was rendered in favor of Fleming in the district court of Douglas county in the sum of \$95.55 and costs, from which the Singer Company prosecutes error. No question is raised as to the sufficiency of evidence to support a judgment for that amount, but the judgment is sought to be reversed upon three grounds:

First—That the statute under which the action was brought is contrary to the constitution of Nebraska.

Second—That it conflicts with section 1 of article 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the pub-

lic acts, records, and judicial proceedings of every other state.

Third—That if the law be constitutional, it does not apply to foreign corporations.

The statute referred to is as follows:

“Sec. 531c. That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employe of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employe by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions.

“Sec. 531d. That it is hereby declared unlawful for any person or persons to aid, assist, abet, or counsel a violation of section one of this act for any purpose whatever.

“Sec. 531e. In any proceeding, civil or criminal, growing out of a breach of sections one or two of this act, proof of the institution of a suit or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state or in this state to seize by process of garnishment, or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done.

“Sec. 531f. Any persons, firm, company, corporation, or

business institution guilty of a violation of sections one or two of this act shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state, and shall further be liable by prosecution to punishment by a fine not exceeding the sum of two hundred dollars and costs of prosecution."

1. Three arguments are made upon the proposition that the statute is in conflict with the constitution of Nebraska. In the first place it is said that the act is broader than its title. The title is as follows: "An act to provide better protection for the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business." We are somewhat at a loss to appreciate the argument based on this proposition. It seems to be the theory of counsel that that portion of the act which provides for the recovery of the debt, costs, expenses, and attorney's fee, and which enacts a penalty for the violation of the law, is not expressed in the title. These features are not distinctly expressed, but the title to the act need not amount to an analysis or complete abstract of its text. It is sufficient if the title, by general language, fairly expresses its subject-matter. Where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title. (*People v. McCallum*, 1 Neb., 182; *State v. Ream*, 16 Neb., 681.) The title of this act is comprehensive. Merely to declare the doing of certain acts unlawful would be nugatory unless the act itself or other provisions of the law provided a redress for injuries inflicted by reason of its violation. Without the section providing a remedy the act would not provide "for the better protection of the earnings" of the persons sought to be protected. Both a substantial enactment of law and a remedy for its violation are fairly included in the title, and

the act would not be complete in the absence of either provision.

It is next urged that the act is unconstitutional because imposing a penalty which does not go to the school fund. The last section of the act undertakes to provide two remedies. One is that the person violating it shall be liable by prosecution to punishment by fine. It is not necessary to here consider whether that portion of the act is valid. If it is, the fine imposed is like all other fines in criminal cases, and is not subject to the objections urged. If it be not valid, the whole act is not therefore unconstitutional. Where a part of an act is void and a part in its nature valid, the whole act is not void, unless it appears from an examination of the act itself that the invalid portion was designed as an inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would not have passed the valid portion alone. (*State v. Lancaster County*, 6 Neb., 474; *State v. Lancaster County*, 17 Neb., 85; *Trumble v. Trumble*, 37 Neb., 340.) But counsel say the provision permitting the recovery not only of the debt, but of costs, expenses, and attorney's fees is in the nature of a penalty; and we are cited upon that subject to *Atchison & N. R. Co. v. Baty*, 6 Neb., 37. In that case an act was held void because it sought to give to the owner of live stock injured upon a railroad double the value of his property. This double recovery was clearly in the nature of a penalty. It had no element of compensation, but in the statute we are considering the damages awarded are purely compensatory. Nothing is allowed by way of vindictive damages or as a penalty, but the injured party is made whole by being permitted to recover the amount of money wrongfully taken from him, together with the exact costs and expenses by him incurred, and a reasonable attorney's fee, which is also an item of expense for which he should be compensated, and which, probably, would have been included as costs and

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expenses even though not otherwise expressed. The law is for none of the reasons urged in conflict with the constitution of Nebraska.

2. Is the act in conflict with the constitution of the United States? It is said in support of this proposition that the courts of Iowa have held that a non-resident of Iowa or a foreign corporation may have an attachment in that state against a non-resident upon precisely the same grounds and upon the same conditions as a resident. The case of *Mooney v. Union P. R. Co.*, 60 Ia., 346, is cited as sustaining that contention. The case cited certainly goes that far; and that case and later cases which might have been cited carry the doctrine further and go to the extent of holding that a citizen of Nebraska may sue another citizen of Nebraska in the courts of Iowa, obtain jurisdiction by attaching and garnishing the wages earned by defendant in Nebraska, and there payable to him by a railroad company which happens to operate in both states; and that in such case the defendant, being a non-resident of Iowa, is not entitled to the benefits of the Iowa exemption laws, and that the Iowa courts will not, even upon principles of comity, give effect to the Nebraska exemption laws, and that by such a device the defendant is absolutely deprived of his exemptions under the law of either state. The question presented is whether the courts and the legislature of this state are required, in order to give full faith and credit to the judicial proceedings of Iowa, to sanction such a proceeding. We think not. The section of the federal constitution referred to requires not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. The laws of Nebraska make sixty days' wages of laborers, mechanics, and clerks, who are heads of families, exempt from attachment, execution, and garnishment proceedings. Where the wages are earned in Nebraska and are there payable to the laborer residing

there, Nebraska is the *situs* of the debt. (*Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 175; *Mason v. Beebee*, 44 Fed. Rep. 556.) As pointed out in the case of *Mason v. Beebee*, last cited, there is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. The case of *Mason v. Beebee* contains a well-reasoned discussion of the whole subject by Judge Shiras. The opinion is too long to quote entire, and the whole of it is so closely applicable to the case at bar that we could not select one portion as more proper for quotation than the rest. Suffice it to say that the case of *Mooney v. Union P. R. Co.*, *supra*, is there discussed *in extenso*, its fallacies laid bare, and the monstrous injustice and disregard of the laws of other states which would result from following the *Mooney Case* are there demonstrated. If the *situs* of the debt was Nebraska and not Iowa, then it follows that no legislative or judicial interposition in Iowa could rightfully sustain the jurisdiction of Iowa courts in such a case. If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska and take from this state the property of that citizen here located, can any one for a moment urge or seriously consider that our legislature and courts, in order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded in order to sustain the courts of another state in overreaching their jurisdiction, in refusing to exercise the comity elsewhere accorded sister states and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of Iowa courts? To quote from the brief of the plaintiff in error a citation from Black on Constitutional Prohibitions: "The moment a state attempts to lay its hands upon the rights of those whose domiciles and affairs are beyond its

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boundaries, its acts are null." And to quote again from that brief, "Where at the place of commission the act is legally innocent, it cannot be elsewhere made a delict,"—a principle which, if correct, must give rise to another principle that where at the place of commission the act is legally wrong, it cannot be elsewhere made right. The decisions of the supreme court of the United States in nowise militate against this view. In *Green v. Van Buskirk*, 5 Wall. [U. S.], 310, and 7 Wall. [U. S.], 139, the decision, so far as it is applicable to this case, we think directly tends to support our view. In that case one Bates, a citizen of New York, owned certain iron safes in Chicago upon which he gave a mortgage to Van Buskirk and others which was executed and delivered in New York. The laws of Illinois required for the validity of a chattel mortgage as against third persons that it should be recorded and the property delivered to the mortgagee. These conditions were not complied with. The laws of Illinois further permitted attachments against a non-resident debtor. A creditor of Bates sued by attachment in Illinois and levied upon and sold the safes. Van Buskirk then sued this creditor in New York state, and the creditor pleaded in bar the attachment proceedings in Illinois. The New York courts held that the transaction was governed by the laws of New York, and the case was then taken by writ of error to the supreme court of the United States, which held that the attaching creditor had been denied a privilege accorded him by the constitution of the United States, that the property, to-wit, the safes, were situated in Illinois, and that the Illinois law must govern them. That is precisely the position of the defendant in error here. His property which was seized was in Nebraska and subject to the jurisdiction of our courts and not those of Iowa.

In *Cole v. Cunningham*, 133 U. S., 107, it was held that it was not in violation of the constitution of the United States for a court in one state, in which proceedings have

been begun to distribute the estate of an insolvent debtor among his creditors, to enjoin a creditor of the insolvent, a citizen of the same state, from proceeding to judgment and execution in a suit against the insolvent in another state by an attachment of his property, which property the insolvent law of the state of the domicile of the parties required the debtor to convey to his assignee. It is true that in *Cole v. Cunningham*, *supra*, there was a strong dissenting opinion by Mr. Justice Miller, concurred in by Justices Field and Harlan; but the dissent there was upon the ground that the opinion of the majority was contrary to *Greene v. Van Buskirk*, the *situs* of the debt in *Cole v. Cunningham*, which it was sought to reach by attachment, being in the state where the attachment was levied, and not in the state of the residence of the parties where the injunction was granted. So that, taking either the majority opinion or the dissenting opinion in *Cole v. Cunningham*, we think that the case lends force to the views we have expressed.

Even the courts of Iowa have refused to apply to their own citizens the rules which they seek to enforce extra-territorially against the citizens of other states, and have restrained a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa by garnishment reaching a debt due for wages earned in Iowa. (*Teager v. Landsley*, 69 Ia., 725.) As said by Judge Shiras in *Mason v. Beebee*, "Is it consistent for the courts of Iowa to forbid by injunction its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa and at the same time entertain suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois?" If full faith and credit have in these proceedings not been given to the public acts, records, and judicial proceedings of another state, it is certainly not the legislature or courts of Nebraska which have been in fault.

The conclusion reached does not conflict with the decision in *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb., 629. It was there held that earnings so seized in Iowa could not be recovered from the garnishee, the Iowa courts having acquired jurisdiction so far as to require the garnishee to pay the money, and the judgment binding the parties to that extent. It is for that reason that a cause of action arose against the creditor for wrongful proceedings in evasion of our exemption laws.

3. Finally, it is urged that if the law be constitutional, it cannot be made to apply to foreign corporations. It is stipulated in the bill of exceptions that the Singer Sewing Machine Company was and has continued doing business in Nebraska. It is stipulated that the debt out of which the controversy arose was contracted in Nebraska. As said by this court in *Turner v. Sioux City & P. R. Co.*, 19 Neb., 241, "There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought; that is, that the law in force when and where a debt was contracted should govern as to the rights of the creditor and debtor in that case." (See on this subject *Dorrington v. Myers*, 11 Neb., 388; *De Witt v. Wheeler & Wilson Sewing Machine Co.*, 17 Neb., 533.) It is only upon a principle of comity that a foreign corporation is permitted to here do business. When it does come here and do business, it does so with reference to our laws. It claims the rights and privileges of our laws and it cannot evade their obligations. It would be monstrous to permit a foreign corporation to hold property here, to conduct business here, to enforce contractual rights obtained under our laws, and at the same time to avoid the contractual obligations imposed by the same laws. But it is said that the judgment complained of grew out of an act committed elsewhere and innocent where it was committed. The general principle is conceded that the law of the place

where an act is done determines its validity; but the tort complained of was not committed in Iowa. The tort consisted in seizing property in Nebraska exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another state; but the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa or in a state other than Nebraska. The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska. The statute in this respect is not confined to actions begun in another state, but extends to every attachment or garnishment of exempt wages whether the proceeding be instituted in this state or elsewhere. It is true that if the proceeding had been instituted in Nebraska, a partial redress could have been had by way of defense in the original action, but that consideration only affects the *quantum* of damages. The tort, the cause of action, would have been precisely the same. There is no question raised as to the jurisdiction of the court over the person of the plaintiff in error. It has committed an act here which is a tort, and it must here answer for that tort. A somewhat similar question was presented in the case of *O'Connor v. Walter*, 37 Neb., 267. It was there said: "In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation."

We neglected, perhaps, in the proper place to notice one objection to the act, but it is one which can be appropriately

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noticed in closing,—that is, that the act is “a vicious example of class legislation,” and *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, is cited in support of that proposition. The act under discussion in that case applied to one class only, and there was perhaps no basis founded upon any reasonable distinction for selecting that class as the recipients of that peculiar privilege. Here the case is different. The act we are now considering applies to every one who falls within the purview of the law exempting wages. The validity of that exemption cannot be doubted; and if it were proper for the legislature to provide that exemption, then it certainly was also proper for the legislature, by appropriate action, to enforce the rights so granted. The mischief, to prevent which the act was passed, is a matter of common knowledge. An extensive and thriving business was being conducted by the institution of suits precisely similar to that out of which this action arose and having for their sole object the evasion of the laws of this state. The act was passed to prevent, and should be so construed as to prevent, the continuance of this infamous business. It is perhaps only fair to say that neither the representatives of the corporation in Nebraska nor counsel for the corporation engaged in this case are shown to have had any part in the Iowa proceedings.

JUDGMENT AFFIRMED.

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WESTERN UNION TELEGRAPH COMPANY V. CITY OF  
FREMONT.

FILED MARCH 20, 1894. No. 6208.

1. **Municipal Corporations: OCCUPATION TAX: AUTHORITY TO LEVY.** Under section 52, chapter 14, article 2, Compiled Statutes, 1891, each city of the second class having more than

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five thousand inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said action.

2. **Municipal authorities are powerless to license or tax any business or avocation conducted exclusively outside of the municipality.**
3. **Telegraph Companies: CITIES: POWER TO IMPOSE LICENSE TAX.** A city of the above class may lawfully enact an ordinance imposing on telegraph companies a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city; and the fact that the telegrams received and delivered within the city were transmitted over the lines of the telegraph company from other points within the state, or that the messages received by it at its office or place of business in the city were transmitted to various other places in the state, does not invalidate the tax. IRVINE, C., dissenting.
4. **Interstate Commerce: MUNICIPAL CORPORATIONS: TAX ON MESSAGES.** State and municipal authorities are powerless to impose a tax upon messages to or from other states, since such a tax would be in conflict with that clause of the federal constitution which gives to congress the exclusive power to regulate commerce among the several states.
5. **Telegraph Companies: INTERSTATE COMMERCE: OCCUPATION TAX.** Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, article 1, of the constitution of the United States, since it in no way interferes with, or regulates, interstate commerce.
6. **An occupation tax may be collected by ordinary suit, where the ordinance imposing the tax so provides.**

**ERROR** from the district court of Dodge county. Tried below before MARSHALL, J.

The opinion by the chief justice contains a statement of the case.

*Estabrook & Davis*, for plaintiff in error:

The legislature has not invested the city of Fremont

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with the power to tax the business described in the ordinance. (*Leloup v. Port of Mobile*, 127 U. S., 640; *Western Union Telegraph Co. v. Alabama*, 132 U. S., 472; *City of San Francisco v. Western Union Telegraph Co.*, 31 Pac. Rep. [Cal.], 10; *Robbins v. Shelby County Taxing District*, 120 U. S., 489; *Moran v. City of New Orleans*, 112 U. S., 69; *Harman v. City of Chicago*, 147 U. S., 396; *Pacific Express Co. v. Seibert*, 44 Fed. Rep., 316, 142 U. S., 339; *City of St. Louis v. Laughlin*, 49 Mo., 559; *City of Dubuque v. Northwestern Life Ins. Co.*, 29 Ia., 9; *Mays v. City of Cincinnati*, 1 O. St., 273; *Caldwell v. City of Lincoln*, 19 Neb., 574; *City Council of Charleston v. Postal Telegraph Co.*, 9 Ry. & Corp. Law J. [S. Car.], 129.)

It is not within the power of the legislature to delegate to one municipal corporation the power to tax a business which is not carried on within the limits of such corporation. (*Wells v. City of Weston*, 22 Mo., 384; *Desty, Taxation*, ch. 11; *Cooley, Taxation*, ch. 3; *City of Charleston v. Postal Telegraph Co.*, 9 Ry. & Corp. Law J. [S. Car.], 129; *Thompson, Law of Electricity*, sec. 518.)

*F. Dolezal, City Attorney, contra:*

The license tax in this case is not a tax on or a regulation of interstate commerce. (*Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411.)

In addition to the tax on realty, personal property, and money an occupation tax may be levied. The legislature has the power to vest municipal corporations with authority to levy and collect license or occupation taxes. (*State v. Bennett*, 19 Neb., 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb., 83; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542.)

The ordinance levies the tax only upon that business of the telegraph company which is done within the city. The tax is valid. (*City of Los Angeles v. Southern P. R. Co.*,

61 Cal., 59, and cases cited; *City of Sacramento v. California Stage Co.*, 12 Cal., 134.)

NORVAL, C. J.

This was an action by the city of Fremont to recover from the plaintiff in error an occupation tax levied under and in pursuance of an ordinance of said city. A general demurrer to the petition was overruled, and the telegraph company having elected to stand upon its demurrer, judgment was entered by the court in favor of the city for \$150 and costs of suit.

The petition, after alleging the incorporation of plaintiff and defendant, avers, in substance, that on the 1st day of April, 1891, and continuously ever since said day, there was and now is conducted and carried on within the corporate limits of said city of Fremont, by various persons and corporations, the business and occupation of receiving, transmitting, and delivering telegraph messages, not including the receipt, transmission, or delivery to or from any department, agency, or agent of the United States, and not including the receipt, transmission, or delivery of any message which is interstate commerce; that on the 23d day of April, 1891, the duly constituted authorities of the city of Fremont, in the manner provided by law, duly passed and adopted an occupation tax ordinance, a copy of which is attached to the petition; that said ordinance was duly approved by the mayor of said city, and published as required by statute, and ever since continuously has been, and now is, in full force and effect, by which said ordinance a license tax of \$150 per annum was levied upon the aforesaid business and occupation, and it became and was the duty of each person and corporation engaged therein within said city to pay such tax; that the defendant, on the date aforesaid and prior thereto, and continuously ever since, was, and is, engaged in, and carrying on within the territorial limits of said city, the business and occupation specified

in paragraph No. 1 of section 1 of said ordinance; that there was due the plaintiff from said defendant on the date last aforesaid the sum of \$150, as a license tax on its said business and occupation, no part of which has been paid, although the payment of said sum has been requested by the city, and refused by the defendant. It is further alleged in the petition "that besides the business and occupation aforesaid, and in addition thereto, the said defendant at the time aforesaid was, and has since continuously been, engaged in the business of sending and receiving messages by telegraph which are interstate commerce in said city, and said defendant had theretofore duly accepted the terms of the act of congress passed in the year 1866 relating to telegraphs and telegraph companies and was and is entitled to all the benefits of said act, and has availed itself of all the benefits of said act and performed its duties thereunder, and has telegraph lines extending throughout the several states of the United States, and to and from and among said several states, all of which said lines said defendant operates and operated during all the aforesaid times by the transmission on and by means of said telegraph lines telegraph messages; that for and during the several years herein mentioned under the laws of this state there has been assessed and defendant has paid property tax on the lines, poles, instruments, realty, and office furniture and stationery supplies that said defendant owns and has located and kept within the state of Nebraska, which said tax on said articles thus paid is and was imposed and collected under and by virtue of sections 39 and 40 of chapter 77, relating to revenue, of the Compiled Statutes of Nebraska, annotated, 1891."

Section 1 of the ordinance levying the tax in question reads as follows:

"Section 1. That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section hereinafter enumerated, to raise

a revenue thereby in the several different sums of the several different businesses and occupations respectively, as follows:

“No. 1. The sum of one hundred and fifty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state; and receiving in this city messages by telegraph transmitted within this state from persons and places in this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission, and delivery of any such messages to and from any department, agency, or agent of the United States, and excepting the receipt, transmission, and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting, and delivering of the messages herein excepted is not taxed hereby.”

Paragraphs 2 to 16 inclusive of said section impose taxes on various other occupations.

Section 2 of said ordinance provides that “the license tax by this ordinance levied is not levied upon any business or occupation which is interstate or which is done or conducted by any department of the government of the United States or of this state, or any officer of the United States or of this state in the course of his official duties, or by any county or other subdivision of this state, or its officer as such.”

Section 3 provides, among other things, that on all occupations on which a tax is levied at a yearly rate the year shall begin on the last Tuesday in April of each year and end on the last Tuesday of the year following, and that such tax shall be due and payable in advance.

Section 4 makes it the duty of every person, partnership, firm, and corporation carrying on any business within the city on which a tax is imposed by the ordinance to pay

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said tax at the time specified in the ordinance for its payment.

Section 5 declares that "the tax hereby levied shall be paid to the treasurer of this city, who, upon payment thereof by any person, shall give a receipt, properly dated and specifying the person paying, the occupation, amount, and for what time said tax is paid; said treasurer shall keep proper account of said tax."

Section 6 provides for the collection of the unpaid license tax by the city treasurer by distress and sale of the personal property of the person or corporation owing such tax.

Section 7 authorizes the city attorney to bring a suit in any court of competent jurisdiction to recover the amount of any tax levied by the ordinance, whenever the city treasurer shall deem himself unable to collect the same by distress.

It has been repeatedly decided by this court that under the constitution of the state the legislature may by general law confer upon cities and villages the power to levy and collect occupation taxes. (*State v. Bennett*, 19 Neb., 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb., 83; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542.) The authority of the law-making body to invest municipal corporations with the power to pass ordinances imposing license or occupation taxes is not now questioned; but it is insisted on the part of the telegraph company that the legislature has not invested the city of Fremont with authority to license or tax the business described in the ordinance in question. The proposition stated we will now consider.

Section 52, chapter 14, article 2, Compiled Statutes, 1891, reads as follows:

"Section 52. In addition to the powers heretofore granted cities under the provisions of this chapter, each city may enact ordinances or by-laws for the following pur-

poses: \* \* \* VIII. To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city, and regulate the same by ordinance. All such taxes shall be uniform in respect to the classes upon which they are imposed; *Provided, however,* That all scientific and literary lectures and entertainments shall be exempt from such taxation, as well as concerts and other musical entertainments given exclusively by citizens of the city."

It will be observed that the foregoing section authorizes cities of the class of the city of Fremont to impose a tax upon every business and occupation carried on within the territorial limits of the municipality, excepting only those mentioned in the proviso clause of the section quoted. The tax must be reasonable, and not burdensome, as well as uniform in respect to the class upon which the same is levied. No question, however, is raised as to the reasonableness of the tax sought to be collected by this action. The legislature has not vested municipal corporations with authority to license or tax any business or occupation carried on exclusively outside of the municipality. There can be no doubt of it. The language of the statute is "on any occupation or business within the limits of the city."

It is argued that the ordinance before us levies a tax on the business of plaintiff in error which is not carried on within the boundaries of the city of Fremont. If this be true, the tax is invalid, for the want of power in the municipality to impose it. But such is not the scope and effect of the ordinance, since it does not attempt to tax the business of telegraphy, which is conducted wholly outside of the corporate limits of the city, but is restricted to that portion of such business as is entirely within the limits of the municipality. It further excludes government messages and messages which are interstate commerce. It is the business and occupation only of receiving, delivering, and transmitting messages within the city which are sought to be

taxed by the ordinance. The fact that the telegrams received and delivered by plaintiff in error within the city of Fremont were transmitted over its lines from other points within the state, or that the messages received by it at its office or place of business in Fremont are transmitted to various other places in the state, does not invalidate the tax. It is that portion of the business alone the telegraph companies transact in the city upon which a license tax is levied by the ordinance. The petition expressly avers, which the demurrer admits to be true, that plaintiff in error was and is engaged in and carrying on within the corporate limits of said city the business and occupation described in paragraph 1 of the ordinance under consideration. Plaintiff in error is therefore carrying on a business or occupation in the city of Fremont, within the meaning of the statute, and is liable to the license tax imposed by the municipal authorities.

*City of Sacramento v. California Stage Co.*, 12 Cal., 134, was an action for the recovery of a license tax levied by an ordinance of the city of Sacramento upon stage companies engaged in the business of carrying passengers to and from Sacramento city. It was claimed there, as here, that the ordinance was invalid because it authorized the imposition of a tax upon a business not carried on entirely within the city limits. The ordinance and the tax levied thereunder were sustained. Baldwin, J., speaking for the court, says: "The question is made whether, inasmuch as the larger portion of this work of transportation is done without the territorial limits of the city, the authorities have a right to levy the tax upon them; and on this question we have no doubt. The company receive and discharge their passengers, and make contracts here for their conveyance, and they have their offices and property here, within the protection of the municipal laws. The mere fact that the business of carrying the passengers is not within the municipal limits does not make the receiving

and discharging of them, and for contracting for them, less a business here. If this business is not a business in Sacramento, it is difficult to say where it is." The principle announced in the above case was recognized and applied by the same court in the *City of Los Angeles v. Southern P. R. Co.*, 61 Cal., 59. In that case the ordinance of the city of Los Angeles levied a license tax of \$60 on every steam railroad company having a depot in said city. The court, in passing upon the case, say: "The fact that the business of defendant extends beyond the city limits does not relieve it from the payment of a license tax for conducting its business within the city. (*City of Sacramento v. California Stage Co.*, 12 Cal., 134.) Defendant is subject to regulation in many respects by the state, yet it is doing a business in Los Angeles, which, with its property there situate, is protected by local authorities. It is interested in many police expenditures, and may as reasonably be charged a local license as may those engaged in other business."

It is difficult to perceive a distinction in principle between the cases above referred to and the question before us. These authorities, it seems to us, are directly in point and sustain the authority of the defendant in error to impose a specific license tax upon the telegraph company for conducting its business within the corporate limits of the city of Fremont. Similar taxes have often been levied on avocations and callings where a portion of the business is transacted and carried on outside of the territorial jurisdiction of the city imposing the same. Physicians and lawyers are frequently called upon to pay an occupation tax, yet the persons belonging to either of these professions transact a large portion of their business outside of the city in which their offices are located. The same is likewise true of wholesale dealers, livery men, contractors and builders, also persons engaged in other callings which could be mentioned; and will it be contended that the li-

cense tax levied upon any of the occupations, or pursuits named, would be invalid? Clearly it would be, if the tax in the case at bar cannot be sustained.

In *Commonwealth v. Stodder*, 2 Cush. [Mass.], 562, cited in the brief of counsel for plaintiff in error, the opinion of the court contains language directly opposed to the holding of the California court in the cases above cited, and from which we have quoted, but the reasoning of the Massachusetts court is unsatisfactory; besides, the statute, under which the ordinance there considered was adopted, is quite different from the one governing the city of Fremont. The Massachusetts statute authorized the mayor and aldermen of the city of Boston to adopt rules and orders "for the due regulation in such city, of omnibuses, stages," etc. The title of the act was "An act to prevent obstructions in the streets of cities and to regulate hackney coaches and other vehicles." It was held that the power conferred was not a tax-levying power, but that "all the apparent object of the act may be secured by due regulations as to the time, place, and mode of using such vehicles, irrespective of any payment of a special duty or tax upon them, as provided in the ordinance." Since the statute there under review conferred no power upon the municipality to levy an occupation tax upon omnibuses and stage coaches, it is obvious that what the court say about want of authority of the city of Boston to require the proprietors of omnibuses and other vehicles running into and out of Boston to pay a license tax was not necessary to a decision of the case before the court.

In the case at bar it is urged that the ordinance we have been considering does not impose a license tax, therefore the tax in question is invalid. The charter of the city of Fremont authorizes levying and collecting "a license tax." Section 1 of the ordinance declares that "there is hereby levied a license tax on each and every occupation and business within the limits of this city," etc. The ordinance, therefore, does levy a "license tax." That

the ordinance makes no provision for the issuance of a formal license is immaterial. By section 5 the city treasurer is required to give a receipt to the person paying the tax, "properly dated and specifying the person paying, the occupation, amount, and for what time said tax is paid." It is not believed that a provision for the issuance of a license is essential to the validity of the tax, but if it were, the receipt provided for in section 5 is a sufficient compliance. It will be observed that the ordinance authorizes the collection of occupation taxes levied thereunder by suit in any court of competent jurisdiction. That the payment of such taxes may be enforced by an ordinary action at law, when the ordinance provides for the collection in that manner, we do not doubt. (*City of Sacramento v. Crocker*, 16 Cal., 119; *City of Los Angeles v. Southern P. R. Co.*, *supra*.)

It is further urged by counsel for the telegraph company that the ordinance imposes a burden upon interstate commerce, and consequently is repugnant to that clause of the federal constitution which gives to congress the power to regulate commerce with foreign nations and among the several states. The power to regulate interstate commerce is within the exclusive power of congress, and it is well settled by repeated decisions of the highest judicial tribunal of the land that a state law which imposes regulations, or restrictions, which operate to hinder or embarrass the free and speedy transportation of commerce between the states, is unconstitutional and void. It has likewise been decided that the telegraph is an instrument of commerce, and that the power to regulate telegraph companies in respect to interstate business is vested in congress alone. In other words, the states are powerless to impose a tax upon messages where communication is transmitted from one state to another. (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1; *Western Union Telegraph Co. v. Texas*, 105 U. S., 460; *Western Union Telegraph Co. v. Alabama State Board of Assessment*, 132 U.S., 472.)

The supreme court of the United States in more than one case has said that a state may lawfully impose a tax upon a telegraph company for telegrams carried wholly within the limits of the state in which such tax is levied. We will now refer to some of the decisions of that tribunal so holding.

In *Western Union Telegraph Co. v. Texas, supra*, the question under consideration was the validity of a statute of Texas requiring telegraph companies doing business in the state to pay tax upon each telegram passing over its lines whether wholly within the limits of the state or coming into the state from a point without, or going from the state out of it. The statute was held void, in so far as it related to messages carried through more than one state, as an interference with or a regulation of commerce among the states. It was further decided that the state had the power to levy a tax on telegrams carried entirely within the limits of the state. Chief Justice Waite, in delivering the opinion of the court in that case, said: "The Western Union Company, having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States." The learned chief justice in the same opinion, after holding that the tax on telegraph messages sent from points without the state to points within, and from points within to points without, is a regulation of interstate commerce and therefore void, uses the following language: "The rule that the regulation

of commerce, which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations, or states, or the Indian tribes, that is to say, the purely internal commerce of a state belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations, or states, or the Indian tribes, belongs to congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the constitution of the United States." To the same effect is *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S., 39.

In *Leloup v. Port of Mobile*, 127 U. S., 640, it was ruled that telegraphic communications, when carried on between different states, are interstate commerce and within the power of regulation conferred upon congress, and that a general occupation tax on a telegraph company affects its entire business, interstate as well as domestic, and is unconstitutional. In that case a tax ordinance of the city of Mobile imposed a license tax of \$1,225 on each telegraph company for the privilege of transacting telegraph business in the city. It is clear that the ordinance is repugnant to the commercial clause of the federal constitution, since it was a restriction upon interstate commerce. In that case the tax was levied upon its entire business, interstate as well as that carried on wholly within the state, while in the case at bar the tax was upon intrastate business alone. In the case referred to, the right of the state to tax the telegraph company's intrastate business was stated.

In *Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411, it was held that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without sep-

aration or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. (See *Western Union Telegraph Co. v. Alabama State Board of Assessment, supra.*)

In the *Case of the State Freight Tax*, 15 Wall. [U. S.], 232, the court had under consideration a statute of the state of Pennsylvania which provided for a tax upon all freight carried by any railroad or canal in the state. The Reading Railroad Company resisted the tax, claiming that it was levied on interstate commerce. The supreme court of the United States held that the tax on the freight transported wholly within the state was valid, but that such freight as was brought into or carried out of the state, being interstate commerce, was not subject to state taxation.

The legislature of the state of Missouri in 1889 enacted a law imposing a tax upon express companies of two per cent of their "receipts for business done within the state." Under the provision of said law taxes were assessed against the Pacific Express Company, a Nebraska corporation carrying on business as an express company in the state of Missouri and several other states. The express company brought suit in the circuit court of the United States for the district of Missouri to restrain the collection of said tax, alleging, among other grounds, that the statute of Missouri, above mentioned, imposed a tax upon interstate commerce and therefore infringed the constitution of the United States. The court, by Caldwell J., held that the tax was not a regulation of, or an interference with, interstate commerce. (*Pacific Express Co. v. Seibert*, 44 Fed. Rep., 310.) An appeal was prosecuted to the supreme court of the United States, where the decree was affirmed, the opinion being reported in 142 U. S., 339. Mr. Justice Lamar, speaking for the court, uses this language: "The first proposition, that the statute imposes a tax upon interstate commerce, and is, therefore, violative of what is

known as the commercial clause of the constitution, is unsound. It is well settled that a state cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs to congress. (*Lyng v. Michigan*, 135 U. S., 161; *Leloup v. Port of Mobile*, 127 U. S., 640; *Western Union Tel. Co. v. Alabama*, 132 U. S., 472; *McCall v. California*, 136 U. S., 104; *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S., 114.) The question on this branch of the case, therefore, is, was the business of this express company in the state of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that in the prosecution of its business as an express company the complainant is engaged, in part, in the transportation of goods and other property between the states of Nebraska, Kansas, Texas, and other states of the Union and the state of Missouri; and also in the business of carrying goods between different points within the limits of the state of Missouri. The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its intrastate business. We think a proper construction of the statute confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done within this state of each agent of such company doing

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business in this state,' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats within this state for the transportation of their freight within this state' may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done within this state,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the state. This positive and oft-repeated limitation to business done within the state, that is, business begun and ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this state' cannot be made to mean business done between that state and other states. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

The principle deducible from these decisions is, that while the state cannot tax either the interstate or government business of a telegraph company, it possesses the power to impose a tax upon the business of such company as is carried on wholly within the state, provided such tax is not levied in gross upon state as well as interstate business, but is restricted to intrastate business solely. And in view of the foregoing authorities, and especially the last one quoted from, we have no hesitation in holding that the ordinance of the city of Fremont in no manner places a

burden or restriction upon interstate commerce, nor does it tax the agency of the federal government. The ordinance expressly excludes from its operation all government and interstate business. The plaintiff in error could transmit messages relating to government business and carry communications from this state to points in other states to persons and places within this state unmolested and without paying to the city of Fremont a cent as license tax therefor. The only difference between this case and *Pacific Express Co. v. Seibert, supra*, is this: In the latter the tax levied was a certain per cent on the gross amount of the receipts of the express company derived from the business done by it within the state, while here a specified sum was imposed upon telegraph companies for the privilege of transacting within the city of Fremont intrastate business. The case cited is directly in point on the question before us and must control our decision herein. The judgment of the district court is right, and is therefore

AFFIRMED.

IRVINE, C., dissenting.

Having taken part in the hearing and consideration of this case, and having reached a conclusion upon one branch thereof different from that stated in the opinion of the court, I desire to express my views upon that branch of the case.

The conclusion reached by the court is that the occupation described in the ordinance is an occupation or business "within the limits of the city" and therefore within the legislative grant of authority to tax. In this view I cannot concur. As a question of authority I concede that the case referred to, of *Commonwealth v. Stodder*, 2 Cush. [Mass.], 562, is not in point, and I further concede that the case of *City of Sacramento v. California Stage Co.*, 12 Cal., 134, supports the view of the court. It is to be re-

marked in regard to the latter case that it is an early case in the history of California jurisprudence decided by two judges only. Mr. Justice Field, now of the supreme court of the United States, and then a member of the California supreme court, either took no part in the consideration of the case or did not concur in the opinion of the majority. The opinion is very brief and unsatisfactory. So far as the reasons of the court can be gathered from the opinion, the decision was based principally upon the theory that the business of receiving and discharging passengers within the city was separate from that of transporting passengers between Sacramento and other places. I do not think this view sound. It might as well be said that in a mercantile establishment the business of wrapping up goods and handing them over the counter to the customers is separate from the business of selling the goods. Another case relied upon in the opinion of the court is that of *City of Los Angeles v. Southern P. R. Co.*, 61 Cal., 59. There the tax was imposed upon every steam railway company "having a depot in the city." The tax was not imposed upon the business of discharging from its trains within the city passengers carried into the city from points without, or upon the business of taking upon its trains within the city passengers to be transported to points without. That form of an ordinance would have made the case analogous to that before us. The tax was not even upon the business of operating a railroad within the city, but extended only to railroads having a depot in the city, and seems to be rather a tax upon the privilege of maintaining a depot than a tax upon the occupation. Even in that view the correctness of the decision may well be doubted. I think a better test of what constitutes an occupation within the limits of a city is found in the cases relating to interstate commerce, where courts have been called upon to define what constitutes a business within a state. As a preliminary to this discussion it may be well

to state that in considering the validity of a tax the language employed, or the form or agency for its enforcement, is not the point to be regarded, but the court should look beyond the form of the tax and determine upon what the real burden is imposed. This point is well stated by Mr. Justice Strong in the *State Freight Tax Case*, 15 Wall. [U. S.], 232, as follows: "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 Black [U. S.], 620, in the *Bank Tax Case*, 2 Wall. [U. S.], 200, *Society of Savings v. Coite*, 6 Wall. [U. S.], 594, and *Provident Institution v. Massachusetts*, 6 Wall. [U. S.], 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the state exacted payment into its treasury."

If we examine this ordinance it seems perfectly clear that the burden of the tax here sought to be imposed is not merely upon the receiving and delivery of messages within Fremont, but that it is upon the business of transmitting messages between Fremont and other points outside of Fremont but within the state. The delivery of messages received in Fremont from the wires to the persons to whom they are addressed, and the receipt of messages from senders thereof at the telegraph office for transmission over the wires, are acts merely incidental to the business of the telegraph company. They are not in themselves a business or an occupation. The gist of the business of the company consists of the transmission of messages over the wires; and the transcription of the messages to paper; their delivery to the persons addressed, and the receipt of written messages at the office of the company from senders thereof are mere

incidents, and inseparable from the principal operations, just as the business of a carrier consists of transporting goods, and the delivery to and receipt from the carrier of the goods at the terminal points are incidental to the transaction of the business, and do not constitute in themselves a business or occupation. The authority of a municipality does not extend beyond its limits. The grant of power to impose taxes, upon which this ordinance is founded, does not purport to confer upon the municipality the power to tax anything beyond the limits of the city. For the purpose of this discussion all occupations may be divided into three classes. First—Occupations without the limits of the city. Second—Occupations partly without and partly within the city. Third—Occupations wholly within the city. I think that the grant of authority to tax could only be conferred and was only conferred as to such occupations as are wholly within the city. Where a portion of a business is wholly carried on within a city, such portion might be taxed, although another portion were conducted wholly outside. But where the business in its nature requires that every part thereof shall extend beyond its borders, it is different. No portion can then be said to be within the city. In the opinion of the court reference is made to occupation taxes upon physicians and lawyers who have made their domicile within the city but a large portion of whose practice may be beyond its borders. The cases are not analogous for the reason that professional engagements are personal in their character and necessarily follow the domicile of the taxpayer. Reference is also made to wholesalers of merchandise and persons engaged in similar occupations. I will concede that a wholesale grocer, for instance, might be subjected to an occupation tax by the city in which his place of business is located, although all his sales might be to persons outside of the city and involve the shipment of the goods sold to points outside; but that business consists in its essentials in the sale

of the goods, and is within the city. I contend, however, that the business of transporting the goods after their sale from the city to points outside the city would not be a business within the city and not subject to taxation.

As I stated before, I believe a test of the question what constitutes a business within the city may be found in the cases relating to interstate commerce. A license tax may not be levied upon a business not within the city, because upon general principles, as well as because of express legislation, the city has no power to impose a tax upon business not "within the city." Similarly, a state may not levy a tax upon business not within the state, for the reason that the federal constitution grants to congress the exclusive power of regulating commerce among the states, and therefore prohibits a state from imposing a tax upon commerce extending beyond its borders, that is, not "within the state." If, therefore, the business of transmitting telegraphic messages between a city and points without the city is business within the city, then the business of transmitting messages between a point within a state and points without the state is business within the state, and therefore not interstate commerce. If that position be correct, then a tax levied by a state upon the business of a telegraph company, a part of which business consists in transmitting messages between points in the state and points without, is not a burden upon interstate commerce and is valid. The law, however, is otherwise. Many cases in the supreme court of the United States might be cited upon the question. There is one, however, which reviews the prior cases in so clear and forcible a manner that a reference to that case will be made in lieu of here reviewing the prior cases.

By a statute of Alabama a tax was levied "on the gross amount of the receipts by any and every telegraph \* \* \* company derived from the business done by it in this state." The Western Union Telegraph Company included in its report to the state board of assessments simply its

receipts from business transacted wholly within the state of Alabama. The board, however, required a report of receipts from all messages, whether carried wholly within or partly without the state. The supreme court of the state affirmed the action of the board of assessments, and the case was brought on a writ of error before the supreme court of the United States. Mr. Justice Miller, delivering the opinion (*Western Union Telegraph Co. v. Alabama*, 132 U. S., 472), said: "The question on which the jurisdiction of this court depends has been decided in this court so frequently of late years, several of the decisions having been made since the judgment of the supreme court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principle of the cases referred to. That principle is, in regard to telegraph companies which have accepted the provisions of the act of congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a state for any messages or receipts arising from messages from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1; *Western Union Telegraph Co. v. Texas*, 105 U. S., 460; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530; *Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411; *Leloup v. Port of Mobile*, 127 U. S., 640; *Fargo v. Michigan*, 121 U. S.,

230; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S., 326." Mr. Justice Miller then states the case and the conclusion of the supreme court of Alabama to the effect that the statute was valid in including all receipts from business done in the state, although the message may have been delivered at or may have been sent for delivery from some office out of the state. He then reviews the cases cited in the opening paragraph in the opinion, showing that all of them hold that no tax can be imposed upon messages or upon receipts derived from messages where the communication is carried either into the state from without, or from within the state to another state and concludes as follows: "We think these cases are so directly in point on the questions arising in the present case that they must control, and, as the record of the case presents the means by which the receipts arising from commerce wholly within the state, and from that which under these definitions may be called interstate commerce, can be separated, the judgment of the supreme court of Alabama is reversed." To my mind this case and those therein reviewed conclusively establish the proposition that the transmission of messages between points within the state and points without constitutes interstate commerce, in other words, business not within the state; and, by a parity of reasoning, that the business of transmitting messages between a city and points without such city is not business within the city.

The case of *Pacific Express Co. v. Seibert*, 44 Fed. Rep., 310, cited in the opinion of the court with approval upon another branch of the case, is, I think, equally conclusive. The facts of that case are stated in the opinion of the court. It was there said by Judge Caldwell: "The tax is imposed on the receipts for 'all sums earned or charged for the business done within this state.' These words qualify the whole act. They are plain and unambiguous. The words 'for the business done within the state' *ex vi termini* import business begun and ended in the state, and include

only intrastate commerce and not interstate commerce. The interjection of the intensifying words 'wholly' or 'entirely' would not alter their meaning or change their legal effect. Interstate commerce is not 'business done within' the state of Missouri. It is business done between two or more states. A package carried by the plaintiff from Omaha to St. Louis is not business done within the state of Nebraska, or the state of Missouri, but is business done between those two states. A contract for the carriage of goods from one state to another is an entire contract and is an interstate contract, and the carriage of goods under such contract is interstate commerce and is not 'business done within' any of the states from, through, and to which they are carried on such contract." That case went to the supreme court of the United States (142 U. S., 339), where it was affirmed. Mr. Justice Lamar said: "The opinion of the court below on this branch of the case is elaborately argued and is conclusive. We concur in the reasoning of it as well as in the language employed, and refer to it as a correct expression of the law upon the subject."

As stated repeatedly by the supreme court of the United States, the transmission of messages by telegraph is analogous to the transportation of goods by common carriers. The tax in the express company case was valid, because it extended only to goods transported wholly within the state of Missouri, and the case was distinguished from the cases already cited upon the ground that the business taxed lay wholly within the state. It is upon the same ground that the opinion of the court declares that this ordinance is not a burden upon interstate commerce, a conclusion in which I entirely concur; but for the very reason that the whole of the business must be transacted within the state in order to prevent the ordinance from being in violation of the federal constitution, I think that it should be wholly transacted within the city in order to be within the legislative grant.

CITY OF FRIEND V. DANIEL INGERSOLL, ADMINIS-  
TRATOR.

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FILED MARCH 20, 1894. No. 5579.

1. **Personal Injuries: EVIDENCE: TABLES OF EXPECTANCY.** In an action for damages for personal injuries, where such injuries resulted in the death of the party injured, or are shown to be permanent, the Carlisle table of expectancy of life is competent and admissible in evidence as bearing upon and tending to prove the expectancy of life, but not conclusive of the question, and is to be received and considered by the jury as any other evidence, and subject to the same rules as to its weight and sufficiency as other testimony; and its statements as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party, such as testimony pertaining to the health of the party at the time of the injury upon which the action is based.
2. ———: ———: **DAMAGES.** Where an injured party, by reason of the injury which is the foundation of the action, has incurred necessary expenses for medical attendance, nursing, etc., and has become liable or indebted for the payment of such expenses, the reasonable and fair valuation of such services may be recovered, although not yet paid by the party injured.
3. ———: **MEDICAL ATTENDANCE: EVIDENCE OF VALUE: REVIEW.** The evidence in the case *held* sufficient to sustain the verdict generally, but that there was no testimony of the reasonable and fair value of the services of the physicians, and defendant in error is allowed to file a remittitur of the sums charged for their services, and the judgment then to stand affirmed. If the remittitur is not filed, the case reversed and remanded.

ERROR from the district court of Saline county. Tried below before HASTINGS, J.

*E. E. McGintie, J. D. Pope, and Robert Ryan*, for plaintiff in error:

The Carlisle tables of expectancy were not competent evidence.) *Shippen's Appeal*, 2 W. N. C. [Pa.], 468; *Den-*

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City of Friend v. Ingersoll.

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*man v. Johnston*, 48 N. W. Rep. [Mich.], 567; *Sellers v. Foster*, 27 Neb., 126; *Milton v. State*, 6 Neb., 144; *Ballard v. State*, 19 Neb., 609.)

There can be no recovery for alleged services of physicians and nurses, because there was no evidence of the reasonable and fair value thereof. (*Meredith v. Kennard*, 1 Neb., 319; *Neihardt v. Kilmer*, 12 Neb., 38; *Republican V. R. Co. v. Fink*, 18 Neb., 92; *Ballard v. State*, 19 Neb., 619; *Stough v. Stefani*, 19 Neb., 471; *City of Lincoln v. Holmes*, 20 Neb., 47; *Rosewater v. Hoffman*, 24 Neb., 222; *Mills v. Saunders*, 4 Neb., 194; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

*F. I. Foss* and *W. H. Morris*, *contra*, contending that the Carlisle tables of expectancy were properly admitted in evidence, cited: *City of Lincoln v. Smith*, 28 Neb., 762.

HARRISON, J.

Minerva C. Doxtater, plaintiff in the court below, commenced an action in the district court of Saline county, Nebraska, July 16, 1891, to recover damages of the city of Friend, in said county, for an alleged personal injury sustained by her April 5, 1891, in falling upon the sidewalk of said city, the fall being caused by the defective and unsafe condition of the sidewalk, according to the statements of the petition. In her petition she pleads that Friend was, on the 5th day of April, 1891, a city of the second class, duly organized and incorporated, and in the exercise of its powers constructed a sidewalk on the south side of one of its streets, and further states: "That in building said sidewalk the city was negligent in this, to-wit, that it used poor material, that which was unfit for the building of sidewalks for people to pass over; that said material was rotten and full of knots, and the boards were too wide and not of sufficient thickness to have the necessary strength for people of ordinary weight to walk upon.

And plaintiff says that at the place just mentioned the city did use at one point at or about sixty feet west from the northeast corner of said lot, and put in, a board about twelve inches wide, and about three-fourths of an inch thick, laid upon three stringers, in which was a knot from six to eight inches wide and about a foot and a half to two feet north of the south side of said walk, and which when stepped upon broke, and on account of the breaking of said knot the board became loosened, and was loosened and unfastened from the stringers from the south side of said walk to the north side, and said board was of poor material, rotten, and knotty; that it had been broken, and it was also loose and unfastened from the stringers and unsafe for people to pass to and fro across; that the same had been known to this defendant for more than a month before the 5th of April, 1891. And plaintiff says that while passing along said sidewalk on the 5th of April, 1891, in company with her daughter, and while passing over said board, to-wit, at a point about sixty feet west from the northeast corner of said lot, without any negligence on her part, or upon the part of her daughter, her daughter stepped upon the board above mentioned, which was in its proper position, but unfastened from the stringers, which fact was unknown to this plaintiff and her daughter, and as the daughter of this plaintiff stepped upon said board, it being unfastened, it flew up, and as this plaintiff stepped forward, not having seen the board fly up, and supposing the sidewalk was all right, her foot caught and she stepped into the hole made by the removal of said board, which was from eight to twelve inches deep, and thereby was thrown down; and plaintiff alleges that by reason of the dangerous and unsafe condition of said sidewalk and of said board she unavoidably fell, and her left limb, hip, and hip joint were thereby broken, sprained, bruised, crushed, and mangled so that said plaintiff became lame and diseased, and has remained lame and diseased ever since the

5th day of April, 1891. And the plaintiff further alleges and charges the truth to be that the said defendant, disregarding its duties in the premises, negligently and carelessly allowed said sidewalk above described to remain in such dangerous condition, and wholly failed, neglected, and refused to repair the same, and make the same safe and secure for the use and purpose for which the same was constructed, to the great damage of persons passing along and over the said sidewalk." Then follows in paragraph 4 of the petition a second statement of the facts, descriptive of the fall and the injury resulting therefrom, and the pain and suffering of the plaintiff and its continuance up to the time of the filing of the petition, and a further allegation of the permanent nature of the injury. Paragraphs 5, 6, and 7 are as follows:

"5. And plaintiff further says that she has been prevented from attending to her necessary duties and vocation all of said time, and been put to a great deal of trouble and expense, to-wit, amounting to the sum of \$3,457.15, as follows:

Bill of Dr. Hewitt .....	\$96 65
Bill of Dr. Watson (assistant) .....	10 00
Nursing .....	144 00
Board and washing .....	42 00
Extra help .....	96 50
Extra fires, lights, bandages, and cotton .....	6 00
Loss of time .....	62 00
Damages for injury .....	3,000 00
	<hr/>
	\$3,457 15

"That all of this has been spent in and about trying to get healed and cured of said injuries, and for expenses attendant thereto.

"6. And said plaintiff alleges that on the 7th day of July, 1891, this plaintiff duly presented in writing to defendant, the city of Friend, her claim against said defend-

ant, duly verified by the oath of this plaintiff, and demanded payment of the same, and that said defendant then and there refused to pay the same or any part thereof.

“7. And plaintiff says that she has been, up to the time that she sustained the injury aforesaid, a skilled nurse, and that by reason of said injury aforesaid she has, since said 5th day of April, 1891, been a constant burden and care to herself and her friends.”

The prayer is for judgment in the sum of \$3,500.

The defendant city filed answer as follows:

“And now comes the above named defendant and for answer to the plaintiff’s petition herein filed denies that in the building of said sidewalk, as set forth in plaintiff’s petition, that said city was negligent; denies that the material used in the construction of said sidewalk was poor; denies that the defendant had any notice, or knew of the defects in said sidewalk, as set forth in plaintiff’s petition; and further answering denies each and every other allegation in plaintiff’s petition contained.”

Of the issues thus formed, on the 18th day of February, 1892, there was a trial to the court and a jury, which resulted in a verdict for the plaintiff in the sum of \$1,050. The city filed a motion for a new trial, which was overruled, and judgment was rendered for the plaintiff for the amount fixed by the verdict, and for costs, and the case was brought here by the city on petition in error for our consideration.

The counsel for plaintiff in error, in their brief, first call our attention to the allegations of the plaintiff’s petition on the subject of the negligence of the defendant city, and the evidence produced on the trial, directed thereto, quoting quite largely from the testimony, and insist, in an extended and able argument, that the evidence was not sufficient to sustain the verdict, especially when viewed in connection with the statements of the petition. We have examined the petition and conclude that it states a cause of action, founded upon the negligence of the city by its proper offi-

cers. We have carefully read all of the evidence contained in the record and are satisfied that although there is a conflict in it on probably every point involved in the question of the negligence of the defendant, yet it is sufficient to support a verdict for plaintiff. It was submitted to the jury for their consideration, on the conflicting evidence, and they have passed upon it as to its weight and sufficiency, and it is not for us to disturb their conclusions, if not manifestly and clearly wrong. Such is the rule of this court often expressed.

On the point of notice to the city, of the defects, there was proof of facts and circumstances sufficient to bring the case within the rule announced in *City of Lincoln v. Smith*, 28 Neb., 762, where it was said by NORVAL, J. (now chief justice): "The rule of law adopted by the courts is that it is not necessary that the authorities of a city should have actual notice that a sidewalk is defective in order to make the city liable. It is sufficient for the plaintiff to prove that the defendant had notice of the defective condition of the sidewalk or establish the existence of facts from which notice would be inferred, or circumstances from which it appears that the defect ought to have been known. (*City of York v. Spellman*, 19 Neb., 383.) There is in the bill of exceptions testimony which tends to establish the fact that the defendant city had both actual and constructive notice of the defective condition of the walk."

The court below allowed parol evidence to be introduced that "a claim such as is in the petition" was presented to the city council by attorney for plaintiff in person. This is assigned as error. Our statute requires all such claims to be verified by the oath of the party claimant, his agent, etc. If error, this could only affect the question of costs. (*City of Crete v. Childs*, 11 Neb., 252), and was not reversible error. To be reviewed here it must have been brought to the attention of the court below, by motion to retax costs and passed upon, and if overruled, then such an action

would be subject to review here if presented by proper record. (*Wilkinson v. Carter*, 22 Neb., 186.)

The plaintiff offered in evidence the Carlisle tables of expectancy of life, to which the defendant interposed the objection that they were incompetent and irrelevant under the facts proved as to the condition of this woman. This objection was overruled and defendant excepted. There was testimony in the case, by physicians and other persons, from which it might be concluded that the plaintiff was as healthy a woman as any of her age. One of the witnesses was the physician who attended her after and during the time she was suffering from the effects of the injury alleged in this case, and he states that he had known her for about ten years; that about seven years prior to the accident he had performed an operation by which he removed a cancer from her breast; that he had prescribed for her about a couple of years before the accident, and that at the time of the injury her health was good for a woman of her age. On the other hand, it was shown that since the injury the cancer had returned, or was again active and causing Mrs. Doxtater considerable trouble and sickness; that if a person was afflicted with cancer, notwithstanding its removal, there would remain a cancerous or diseased condition of the blood or system and the germ or seed of the cancer exist in the body of the person and a return of the cancer more than probable to occur in the near or remote future. It will be gathered from the above summary or general statement of the substantial purport of the testimony *pro* and *con*, as to the physical condition of Mrs. Doxtater at the time of the injury, that it was one of the disputed elements of the case and upon which the evidence was conflicting,—an inquiry to be determined by the jury, in the same manner as any other disputed fact in the case, from all the testimony introduced bearing upon it and tending to either prove or disprove it; and from this, coupled with other facts, the expectancy of life of the plaintiff ascer-

tained. Under such an existing condition of the testimony did the court err in allowing the Carlisle tables of expectancy to be introduced? This table is almost, if not universally, admitted in evidence as competent in cases of damages for death of a person caused by injury or in actions for damages where death does not ensue, but the injury is shown to be permanent. The admissibility of the table should, it seems to us, depend to some, if not to a great, extent upon what facts enter into it as a table, as its constituent elements or parts, or, in other words, upon what facts or upon the lives of what class of persons were the calculations based or made, and were they correctly and accurately made? If the calculations which resulted in the Carlisle tables were predicated upon a particular or selected class of lives, or of healthy persons alone, then it cannot be introduced in any case except where the same kind of a life is involved in the controversy; but if based upon the general or average of all lives, then it can be introduced, or is competent in any proper case in which the expectancy of the life of a party enters as an element of inquiry, not as conclusive or as specially governing the inquiry, but to be considered as any other piece of testimony and its weight and sufficiency to be determined in the same manner.

The supreme court of Pennsylvania, in the case of *Steinbrunner v. Pittsburg & W. R. Co.*, 23 Atl. Rep. [Pa.], 239, in passing upon the admissibility of testimony of this kind, held: "In a case where the expectation of life of deceased is a question for the jury, the Carlisle mortality tables are admissible in evidence, but are not conclusive; the expectation being affected by the particular circumstances in the case," and in the body of the opinion stated as follows: "In estimating the damages for the death of the deceased, his expectation of life became an element of importance. His earning power being fixed by the evidence, the next question to be settled by the jury would naturally be, how

many years will he probably live to exercise this power? This can never be decided accurately in single cases. The most a jury, or any one else, can do is approximate it. A man may die in a day, or he may live to earn wages for twenty years. It follows that there must always be an element of uncertainty in every such case. But there are some rules to be observed which aid to some extent in such investigations. Thus, if a man is in poor health, especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less than that of a man in robust health. Again, the age of the person and his habits are among the important matters for consideration. It needs no argument to show that the expectation is much greater at twenty-one years than at fifty. The value of the Carlisle tables in bearing upon this question depends in a measure upon the manner in which they are made up. \* \* \* The evidence in this case is not very clear as to the mode in which these tables were composed. I have therefore consulted the *Encyclopædia Britannica*, a very high authority, (vol. 13, p. 176), from which I extract the following: 'The Carlisle table was constructed by Mr. Joshua Milne from materials furnished by the labors of Dr. John Heysham. These materials comprised two enumerations of the population of the parishes of St. Mary and St. Cuthbert, Carlisle [England], in 1780 and 1787, (the number in the former year having been 7,677, and in the latter 8,677,) and the abridged bills of mortality of those two parishes for the nine years, 1779 to 1787, during which period the total number of deaths was 1,840. These were very limited data upon which to found a mortality table, but they were manipulated with great care and fidelity. The close agreement of the Carlisle table with other observations, and especially its agreement in a general sense with the experience of assurance companies, won for it a large degree of favor. No other mortality table has been so extensively

employed in the construction of auxiliary tables of all kinds for computing the values of benefits depending upon human life. Besides those furnished by Mr. Milne, elaborate and useful tables \* \* \* have been constructed by David Jones, W. T. Thompson, Chisholm, Sang, and others. The graduation of the Carlisle table is, however, very faulty, and anomalous results appear in the death rates at certain ages.' It appears, therefore, that the Carlisle table is based upon general population, and not upon selected or insurable lives."

We conclude that in the case at bar the table offered and received was competent evidence, not conclusive but subject to be varied, or modified, or entirely contradicted as to the expectancy of life of plaintiff by any other competent evidence introduced on the same subject, such as proof that she was unhealthy or diseased at the time of the injury, which would certainly tend to weaken and, if strong enough, to destroy the force of the rule for determining such expectancy given in the table. For the general rule that the table is competent, see the following authorities: Rogers, *Expert Testimony*, 231, and cases cited in note; Abbott, *Trial Brief*, 84; Abbott, *Trial Evidence*, 724; 22 Am. L. Reg., 105, note.

We do not think the instructions on the question of the expectancy of life of plaintiff were nearly as full as they should have been. In fact it was only covered incidentally in instructions upon other points; but no further instructions were asked on the subject, and, furthermore, we do not think any prejudice to defendant's rights resulted from the lack of further instructions on this subject. The rule announced in this case does not conflict with the one heretofore given in the cases of *Roose v. Perkins*, 9 Neb., 304; *Sellars v. Foster*, 27 Neb., 118, and *City of Lincoln v. Smith*, *supra*, in all of which the court was only called upon to pass on the question of admissibility of the table in cases where it was either proved beyond contradiction or

admitted that at the time of injury the injured party was a healthy, robust person, and the point raised and decided in this case was not involved and not considered.

Complaint is made of the giving of instruction No. 13, requested by plaintiff, or rather of the use of the two last words in the instruction. It is more than probable that a better choice of words could have been made, but when read, considered, and construed in connection with the other portions of the same instruction and with the instructions in the case taken as a whole, we cannot discover wherein it could have misled the jury.

There was the further assignment of error that Mrs. Doxtater was not entitled to recover for alleged services of physicians and nurses. In this was included two propositions which were argued by counsel for plaintiff in error, one being that there was no proof that Mrs. Doxtater had paid any of these bills, and hence she was not entitled to have them considered as elements of damage or to recover them as such. The evidence shows that they had not been paid, but we understand the rule to be that where expenses of this nature have been incurred and the party has become liable for their payment, they may be recovered although they have not been paid. (3 Sutherland, Damages, 721, and cases cited in note.) The other proposition included in the above assignment of error presented in brief of counsel for the city was that the court erred in giving the following instruction on the subject of the services of physicians, etc.: "If you find for the plaintiff and find from the evidence that the plaintiff has been injured and that it has been necessary for her to procure the services of physicians and nurses, you should allow such sum as would be a reasonable and fair value for such services of physicians and nurses as shown from the evidence were necessary on account of the injury, not exceeding in all \$3,500," when there had been no evidence introduced whatever of the reasonable and fair value of the physicians' services. This proposition

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is correct; and the giving of the above instruction was error, as there was no testimony in the case in regard to the reasonable and fair value of the services of the physicians upon which to base it or to warrant the court in giving it. "Instructions to a jury must be based on the evidence aduced on the trial." (*Ballard v. State*, 19 Neb., 610.) "It is the fair and reasonable value of services which may be recovered." (*Sutherland, Damages*, 720, 721, and notes; *Neihardt v. Kilmer*, 12 Neb., 38; *City of Crete v. Childs*, 11 Neb., 253.) The amount of the bill for one physician was \$96.65, and of the other \$10. The plaintiff may file a remittitur of the above sums within thirty days from this date as of the date of the verdict, and, if done, the case will stand affirmed. If not, it will be reversed and remanded for further proceedings.

JUDGMENT ACCORDINGLY.

POST, J., not sitting.

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JOHN D. GLADE, APPELLEE, V. CHARLES C. WHITE,  
APPELLANT.

FILED MARCH 20, 1894. No. 5599.

1. **Partnership: EVIDENCE: REVIEW.** In an agreement for the settlement of partnership matters, the stipulation that one of the partners individually assumed and agreed to pay all the outstanding debts and liabilities of the firm presented a question of fact whether or not taxes on property used by said firm, though not owned by it, constituted part of its firm liabilities, and a finding in the affirmative of such proposition, not being without support of evidence, will not be set aside as unsupported by sufficient proof.
2. ———: ———: ———. The finding of the trial court adversely to an arbitrament having been entered into between partners

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for the settlement of differences between them will not be disturbed when there were such proofs as would justify the conclusion reached as one which might reasonably be attained upon due consideration thereof.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

*F. I. Foss*, for appellant.

*J. W. Dawes* and *J. R. Webster*, *contra*.

RYAN, C.

On the 22d day of December, 1888, C. C. White made to John D. Glade his promissory note for the sum of \$10,000, with eight per centum interest, due on or before January 1, 1891. To secure payment of the note Mr. White and his wife executed to Glade a mortgage on certain real property situated in Saline county, Nebraska. On the 14th day of February, 1891, the whole of said note not being paid, proceedings for the foreclosure of the aforesaid mortgage were begun in the district court of the aforesaid county. The defendant C. C. White answered, admitting the alleged execution of the aforesaid note and mortgage, but averring payment thereof by having and keeping on deposit in the State Bank at Crete (the bank where by its terms said note was payable) money sufficient to pay the balance due on the note aforesaid, which money the plaintiff had ever refused to accept in payment thereof. The defendant further answered that on December 22, 1888, defendant had bought of plaintiff certain real property in Saline county, which property was in plaintiff's two warranty deeds to defendant duly described. The defendant alleged that the real property described in each of said deeds was by plaintiff warranted free and clear of incumbrance, but, as defendant alleged, these warranties were broken by the existence of incumbrances warranted

against by reason of taxes to the amount of \$530.36 having been assessed and existing as a lien on said real property at the date of the aforesaid conveyances. The defendant alleged in his answer that he had tendered to plaintiff tax receipts evidencing the payment by defendant of the taxes aforesaid to the amount of \$530.36, together with the entire balance due on said note after credit given for the taxes paid as aforesaid. The plaintiff in his reply denied the alleged tender, and further alleged that while it was true that the defendant had purchased of plaintiff the property described in the deeds referred to in defendant's answer, that at and long prior to December 22, 1888, plaintiff and said defendant C. C. White were copartners doing business in owning and operating flour mills, and had owned and operated them as part of the real estate covered by said conveyances long prior to July 8, 1887, as copartnership property, and long before said taxes in defendant's answer mentioned were assessed or levied for the year 1888, and on said 22d day of December, 1888, and as a part of the same transaction with the conveyance of plaintiff's partnership interest in the property conveyed by the aforesaid warranty deeds, plaintiff and said defendant dissolved their copartnership; that as part of the said dissolution a written agreement was entered into between plaintiff and defendant by which the defendant, designated as the "party of the second part," contracted as follows: "The party of the second part assumes and agrees to pay all outstanding debts and liabilities of the said copartnership," and in the language of said reply, "and a charge and a lien on said copartnership property, and were, by the terms of said copartnership, assumed and agreed to be paid by the said defendant Charles C. White, and were not and are not a proper set-off or charge against this plaintiff or of the indebtedness due him." It is not very clear just what facts it was intended should be stated by the above language. Probably, however, it was the intention to plead

that the tax lien set up by defendant by way of set-off, as having been paid, should not be treated as such set-off, because in paying the taxes defendant had done no more than by the language above quoted from the agreement he had assumed to do. This intention of the pleader is further evidenced by the following language of the reply: "And the said note and mortgage here in suit were given to the plaintiff by the defendant Charles C. White, as part of the consideration to be paid by said defendant Charles C. White to this plaintiff, for his interest in said copartnership property, said deeds and the printed covenants thereof were expressly limited by the written clauses of the deeds to the interest of the plaintiff grantor." In the reply were these further averments: "And the plaintiff shows and avers that the above contract against incumbrances was not intended to apply to, and cannot have a legal effect to apply to, any incumbrance that had been assumed by said copartnership or had accrued against said property as a copartnership liability, but must be held to apply to and to covenant against such incumbrance as had accrued against said property by the act of this plaintiff, or as may have existed against the said property prior to its becoming the property of the copartnership, and not assumed by said copartnership."

The description of the property and the history of its title are rather confusing, for which reason they have been ignored until the claims of the parties litigant, as stated in the pleadings, should have been stated as clearly as possible without further details. The appellant states the history of the title of the property conveyed (using designations "A" and "B," which we shall adopt as descriptive of the property) in the following language: "There are two flouring mills on the Big Blue river, one on the north and one on the south side of Crete. The south mill is designated as mill 'A,' the north one as mill 'B.' The south mill, 'A,' was owned by one Bridges and one Johnston,

each having an individual one-half interest therein. Johnston sold his half to defendant White. Bridges sold his half to John D. Glade, plaintiff, and under the agreement herein plaintiff Glade in January, 1889, sold his half interest to the defendant herein. The north mill was owned by one Seeley, who sold a half interest in the same to the plaintiff and the defendant herein as the firm of White & Glade, and one-half interest to George H. Glade. George H. Glade subsequently sold one-half of his interest, to-wit, one-quarter interest in mill 'B,' to his father, the plaintiff herein, and also sold to the defendant White the other quarter interest in said mill 'B,' and John D. Glade, under the agreement herein, sold to defendant White his individual quarter interest in mill 'B' and also his interest in said mill as a member of the firm of White & Glade. These several transfers concentrated the title to the entire property in defendant White."

The two deeds referred to in the answer were of date December 22, 1888, the status of the title being at that time as indicated by the quotation made from appellant's brief. Each of these deeds was made by John D. Glade and wife to Charles C. White, and described the property conveyed as the undivided half interest in the following property, followed in one deed by the description for which "A" stands as represented by appellant's brief, and in the other deed by the description which "B" represents therein. It will be observed that the copartnership firm of White & Glade, as such, at the date of said two deeds had title to only an undivided one-half of the mill property designated as "B." In his individual name, therefore, the plaintiff held title to one-half of one-half of the mill property last referred to, while he owned in his individual name one-half of the property referred to as "A" in appellant's brief. The covenants in the deed made by Mr. Glade of date December 22, 1888, were printed and were of the usual form of warranty employed in conveyances described

as "warranty deeds." These warranties could only be held to apply to such interest as by the limitations of his conveyance the grantor assumed to own and convey. The appellant in his brief says payment of taxes on all the property in which Glade had conveyed his interest to White was made by White, except that White, discovering that the taxes for 1888 had not been paid by Glade on his several interests, was obliged to and did pay the same, and sought to retain the same from the last payment on the note as to which foreclosure proceedings were instituted in this case. In first examining the facts of this case and the arguments in respect thereto, it seemed to the writer that the question presented was simply as to the effect of the covenants of warranty and Mr. Glade's liability thereon. To the assertion of these payments of \$520.36 as a set-off by reason of a breach of the covenants of warranty contained in the deed of Mr. Glade there is one insuperable objection, and that is that there was introduced in evidence no record or copy thereof showing a levy of taxes in Saline county for the year 1888 or any other year, neither was there introduced the original assessment roll, or a copy thereof, showing how the property was assessed. It is true there were introduced two schedules which apparently are copies of the treasurer's book upon which usually taxes are paid and so marked, but this book is neither a copy of the record of the levy of taxes, nor of their assessment. The parties presented their evidence in the trial court not as though the question was whether or not the defendant was liable upon his covenants of warranty, but whether or not the copartnership should have paid the taxes for the year 1888 as a liability of the firm. The firm of White & Glade used the property in 1885, 1886, and 1887 without payment of rent, and during those years the taxes were paid by the check of the aforesaid firm apparently without any special arrangement, but as a matter of course. All the taxes for the year 1888 seem,

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from the tax receipts given in evidence, and the oral testimony, to have been assessed to White & Glade as against the property used by them. Under these circumstances the trial court found that these taxes for the year 1888 were among the liabilities of the firm of White & Glade, and that, therefore, by paying them the defendant did not create in his own favor a right of set-off as against the amount evidenced by the note, which, with the mortgage securing it, formed the basis of this action. As the evidence above referred to was sufficient to justify the court in arriving at the conclusion which was reached, that the taxes for 1888 were firm liabilities within the purview of the agreement of the parties, such conclusion will not be disturbed as being without support of evidence. There was evidence offered with a view of showing that these matters in dispute had been settled by an arbitration between the parties. The alleged submission to arbitrament was not in writing, and was denied by the plaintiff and one, at least, of his witnesses. A finding that there was an arbitrament would be contradictory of the essentials necessary to sustain the judgment of the trial court. In view of the contradictory nature of the evidence upon which the judgment of the court was based, we could not set aside its decree as unsupported by the evidence. Indeed, as an original question, we should reach the same conclusion upon the evidence as was reached by the trial court. The judgment of the district court is

**AFFIRMED.**

Post, J., not sitting.

## WILLIAM WALDORF V. ISAAC HAGGIN.

39	735
43	402

FILED MARCH 20, 1894. No. 5537.

**Trial:** FAILURE TO GIVE INSTRUCTION ON ISSUE. The failure or refusal of a district court to instruct the jury on the only material issue in the case being tried is reversible error.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

*E. E. McGintie and Robert Ryan*, for plaintiff in error, cited: *Klosterman v. Olcott*, 27 Neb., 685; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 111; *McPherson v. Wiswell*, 19 Neb., 117; *Grim v. Robinson*, 31 Neb., 542; *Uhl v. Robison*, 8 Neb., 277.

*Abbott & Abbott, contra.*

RAGAN, C.

On the 20th of May, 1889, Isaac Haggin was the owner of, and living upon, a quarter section of land in Saline county. On that day he conveyed it by a warranty deed, recorded three days later, to his brother, John B. Haggin. On the 18th of November, 1889, John B. Haggin and his wife, by warranty deed, reconveyed this land to Isaac Haggin, which deed was recorded on the 24th of November, 1890. On the 8th day of January, 1890, John B. Haggin and his wife conveyed the land by warranty deed to one J. William Haggin. This deed was recorded on the 22d of the same month, and on that day J. William Haggin sold and conveyed the land to the plaintiff, William Waldorf, who brought this suit in ejectment against Isaac Haggin. Isaac Haggin set up as a defense to the action that the conveyance made on the 20th of May, 1889, to John B. Haggin, his brother, was in pursuance of a sale then

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made to him of the premises, and the consideration of the conveyance was that John B. Haggin assumed the payment of certain incumbrances on the land and would pay him, Isaac, the remainder of the purchase price in money, (what amount John B. Haggin was to pay, however, is not stated in the answer); that he, Isaac, was to, and did, remain in the possession of the premises conveyed, in pursuance of a verbal agreement with his grantee to that effect, until he should pay the balance of the purchase money; that such balance of purchase money was not paid, and on the 18th day of November, 1889, the contract of sale was rescinded, and John B. Haggin and his wife reconveyed the premises to him, Isaac, by a warranty deed; that he was then in the exclusive possession of the premises, and had since remained in the possession, claiming title under this deed of November 18, 1889, although the deed was not recorded until the 24th of November, 1890; and that the deed made by John B. Haggin and wife on the 8th day of January, 1890, to J. William Haggin, and the deed from him to Waldorf on the 22d of January, 1890, were made in fraud of his, Isaac's, rights, and that plaintiff and plaintiff's grantor were not innocent purchasers of the premises without notice, as his, Isaac Haggin's, possession of the premises at said time was notice to Waldorf and his grantor of his, Isaac Haggin's, rights. Waldorf replied to this answer by general denial. Isaac Haggin had a verdict and judgment below, and Waldorf brings the case here for review.

The first error alleged is that the verbal agreement between John B. Haggin and Isaac Haggin, under and by which he held possession of the premises conveyed until such a time as the balance of the purchase money should be paid, was void, as a secret trust reserved in his favor; but in the view that we take of the case this point is wholly immaterial. At the time that John B. Haggin and wife conveyed the premises to Waldorf's grantor, to-

wit, January 8, 1890, Isaac Haggin was in the actual possession of these premises, claiming title thereto by virtue of a deed from John B. Haggin under date of November 18, 1889. At the time that John B. Haggin conveyed the premises to Waldorf's grantor, Isaac was not in the possession of the premises claiming to hold such possession by virtue of the verbal agreement made with his brother on May 20, 1889. That agreement, according to Isaac Haggin's theory of the case, was rescinded by the reconveyance made to him by John B. Haggin on November 18, 1889. There is no dispute in this case that, at the time Waldorf's grantor obtained title to these premises from John B. Haggin, and at the time that Waldorf obtained his title to the premises, Isaac was in the possession of these premises, claiming absolute title to them by virtue of the reconveyance made to him by his brother, John B. Haggin, on November 18, 1889. This possession, then, of Isaac Haggin was of itself notice to Waldorf and his grantor of Isaac Haggin's rights to the land. Isaac Haggin's case must stand or fall on the reconveyance he alleges his brother, John B. Haggin, made to him on November 18, 1889. If that conveyance was made and delivered as alleged by Isaac Haggin, then his title to the premises must prevail over that of Waldorf. On the other hand, if the conveyance under which Isaac Haggin claims, dated November 18, 1889, was not in fact so made, but if such conveyance was in fact a forgery, then Waldorf's title and right to the possession of these premises is superior to the claim of Isaac Haggin.

On the trial the evidence introduced by Isaac Haggin tended to prove that on the 18th day of November, 1889, his brother, John B. Haggin, and his wife duly made, acknowledged, and delivered to him the deed in evidence, conveying the premises in question to him, Isaac Haggin, and by virtue of that deed he was in possession of the premises at the time the suit was brought, and had been

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since the execution of the deed, claiming title under it. On the other hand, the evidence offered on the trial by Waldorf tended very strongly to show that John B. Haggin and his wife, at the time they signed the deed of November 18, 1889, did so not knowing that it was a deed of the premises, and thinking and believing it was a writing or paper which gave them a title or right to the possession of some horses which they say Isaac Haggin had, before that, agreed they should have. John B. Haggin testified that he never did sign a deed of these premises to Isaac Haggin; that he signed the paper at the time and place that the deed purports to have been signed; that he was then seventy-five years of age and had not been able to see to read for ten years; that he had owned the premises in controversy from the 5th day of May, 1889, until he conveyed them to J. William Haggin; that he purchased them from his brother, Isaac Haggin, and paid for them by assuming certain incumbrances on the land and paying his brother a balance of \$—— in cash; that he renewed the mortgages on the land in his own name, and that on the 18th of November, 1889,—the date of the deed which Isaac Haggin alleges that he, John B. Haggin, made,—Isaac Haggin was then indebted to him and still remains indebted to him. His wife testified that she signed a paper at the time and place that the deed purports to have been signed, but that she thought that the paper she signed was a writing which granted to herself and husband the title or possession of the horses, as mentioned above, and that she was at that time sixty-nine years of age.

From what has been stated above of the pleadings and evidence it will be seen that the real issue in this case was whether or not the deed under which Isaac Haggin claims title and possession of the premises, alleged by him to have been made and delivered to him by his brother and wife on November 18, 1889, was in fact made, or whether the grantors in such deed were imposed upon and deceived,

and signed the paper, when in fact they thought they were executing something else.

The learned judge who presided at the trial below, and for whom, both as a gentleman and a jurist, we have the highest respect, refused all instructions asked by both parties to the suit and charged the jury orally. This charge covers more than twelve pages of closely printed matter, and in this charge the only reference to the real issue in the case is contained in the following excerpt: "The plaintiff further makes this claim that the deed from John B. Haggin and his wife, which they allege was made subsequently to the deed from John B. Haggin, they allege was not in fact made by John B. Haggin and his wife, but that John B. Haggin and his wife had a supposition that they were signing some other paper. You must remember this is not a suit by the plaintiff to recover any damages for any cheat perpetrated on him. This is a suit where he alleges that he has a legal interest in the land and is entitled to the possession of it, and defendant has the right in opposition to that to set up any answer that he may, showing in himself or another a legal interest in the land, or any equitable defense. He has the right to put up either." This instruction was not applicable to the evidence introduced to prove and disprove the issue. Waldorf was entitled to an instruction to the effect that if the jury found that the deed of November 18, 1889, under which Isaac Haggin claimed title and possession to the premises in controversy, was not in fact made and delivered by John B. Haggin and wife; that at the time they signed the conveyance they were imposed upon, deceived, and fraudulently induced by Isaac Haggin to execute the deed, when in fact they thought and believed that they were executing some other paper, then Waldorf was entitled to a verdict at their hands for the title and possession of the premises. The execution and delivery of the deed under which Isaac Haggin claims these premises was put in issue both by the

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pleadings and the proof, and Isaac Haggin's case depended upon the question as to whether his brother, John B. Haggin, and his wife did actually make the deed of reconveyance to the premises to him; and on this issue it was the duty of the trial court to instruct the jury, and his failure to do so was error. It is true, as the learned court said, that the suit was not brought by Waldorf to recover damages for any cheat perpetrated upon him; but this language of itself had a tendency to mislead the jury. It was an intimation to them that whether the deed under which Isaac Haggin claimed was fraudulently obtained by him from his brother was immaterial, so far as Waldorf was concerned; but it was not immaterial. Waldorf had succeeded to the rights of John B. Haggin in these premises. If John B. Haggin had no title to the premises when he conveyed them to Waldorf's grantor, then Waldorf perhaps had no title; but Isaac Haggin's entire case, both his title to the premises and his right to the possession of them, depended entirely upon the validity of this conveyance which he alleges his brother made to him.

The judgment of the district court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

RYAN, C., having been of counsel, took no part in the decision of this case.

POST, J., not sitting.

GEORGE W. PLEASANTS, APPELLEE, v. HARRISON H.  
BLODGETT ET AL., APPELLANTS.

FILED MARCH 20, 1894. No. 4284.

1. **Vendor and Vendee: RIGHT OF OCCUPANT: NOTICE.** A person buying real property in the actual possession and occupancy of another is charged with notice of any right, title, or interest which such occupant has in such property.
2. ———: **QUITCLAIM DEEDS: BONA FIDE PURCHASER.** One who holds real estate by virtue of a quitclaim deed from his immediate grantor, whether a purchaser or not, is not a *bona fide* purchaser in respect to outstanding and adverse equities and interests against his grantor shown by the record, or which are discoverable by the exercise of reasonable diligence in making proper examination and inquiry.
3. **Quitclaim Deeds.** One who purchases real estate and takes a quitclaim deed therefor, takes only the interest his grantor has in the property at the time of such conveyance. *Pleasants v. Blodgett*, 32 Neb., 427, followed and adhered to.
4. **Vendor and Vendee: RECORD OF MORTGAGE.** The existence of record of a mortgage on real estate is of itself sufficient to put an intending purchaser of the property on inquiry as to the interest of such mortgagor in such real estate.
5. **Statute of Limitations.** In an action to quiet title the statute of limitations does not begin to run in favor of the defendant until some assertion of ownership or claim to the premises is made by him.

REHEARING of case reported in 32 Neb., 427.

*H. H. Blodgett*, for appellants.

*Charles O. Whedon* and *Charles L. Hall*, contra.

RAGAN, C.

This is a rehearing of *Pleasants v. Blodgett*, 32 Neb., 427. The opinion there reported contains a sufficient

statement of the facts in the case. Counsel for appellants on the rehearing contends :

1. That they are *bona fide* purchasers for value without notice of Pleasants' title, and strenuously insists that the district court had not before it evidence to support its finding that appellants were not *bona fide* purchasers, and that this court was entirely wrong in affirming the decree of the district court. This contention of appellants has led us to a re-examination of the entire evidence in the record. This record contains evidence showing that on the 3d of February, 1874, Pleasants bought the property in controversy from one Boyd and paid for it by assigning to Boyd a judgment, and for the balance of the purchase price gave his note to Boyd, secured by a mortgage on the property; that this mortgage was at once recorded; that at this time the property was a vacant lot without any improvements; that Boyd promised Pleasants to execute a deed and leave it with one Scott for Pleasants, and afterwards told him he had done so; Scott does not remember whether the deed was left with him or not, but says it might have been; that some of his papers were destroyed by fire; that Pleasants in 1885 paid off the mortgage he had given Boyd, and in April, 1886, paid up the taxes and took actual possession of this lot until then vacant and unoccupied; that Boyd left the state about 1875, having sold the Pleasants note and mortgage; that in 1887 Blodgett was advised that in 1874 he had sold the property to Pleasants and taken a mortgage from Pleasants; thereupon Boyd executed a second deed for the property to Pleasants; that appellant Blodgett claims title to this lot by virtue of a quitclaim deed from Boyd, dated August 6, 1875, and recorded by Mr. Blodgett eleven years and three days later; that Mr. Blodgett took no possession of this lot; that he exercised no act of ownership over it; that his first assertion of ownership of the property was the filing of his deed; that he never paid any taxes on the lot; that he was present when Pleasants bought

the lot of Boyd; that the transaction—that is, the purchase of the lot and the giving of the mortgage—occurred in Mr. Blodgett's office. Boyd, by his deed to Blodgett, expressly quitclaimed such interest as he, Boyd, had in the property. Boyd at that time had no interest in the property and hence conveyed none. (*Hoyt v. Schuyler*, 19 Neb., 657; *Johnson v. Williams*, 37 Kan., 179.) We cannot say from this evidence that the district court erred in finding that Mr. Blodgett was not an innocent purchaser of this property.

2. So far as appellants, the Ritcheys, are concerned, they claim to have purchased this property from Mr. Blodgett, taking from him a quitclaim deed and giving him back a mortgage to secure the entire purchase money. At the time they took their quitclaim deed Pleasants was in the actual and open possession of this lot. His possession was notice to all the world of his rights and interest in the property. (*Uhl v. May*, 5 Neb., 157; *Scharman v. Scharman*, 38 Neb., 39.)

3. The next complaint of appellants is that to Pleasants' action to quiet title to this lot they set up as a defense that "Boyd and Pleasants confederated together to make a security and sale of the mortgage," and for this purpose Pleasants gave his note without consideration to Boyd for \$25, secured by a mortgage on this property. This note Boyd was to pay, and as a matter of fact Pleasants never bought the lot, and that the district court, and this court as well, wrongfully refused under the evidence to so find. This was a good defense, if proved, but, in our humble opinion, the finding of the district court adversely to the contention of appellants as to this defense is supported by the evidence. The fact that there was of record a mortgage from Pleasants to Boyd on this property was sufficient of itself to warn a prudent intending purchaser thereof that Pleasants probably claimed some interest in the property. When one makes a mortgage on real estate to another the presumption, at least, is that the mortgagor is the owner of the property mortgaged.

4. The fourth complaint of appellants is that the district court in its former opinion disregarded the plea of the statute of limitations set up by appellants to appellee's action. Counsel seems to overlook the fact that this is an action brought by appellee to quiet his title; and we are not aware of any rule of law that requires the owner of real estate to bring such an action until some one in some manner sets up or asserts some title or claim against the property, the title of which is sought to be quieted. So far as the evidence in the record shows, the first assertion of title or ownership to the property in controversy ever made by any of the appellants was made by appellant, Mr. Blodgett, when he filed his quitclaim deed in August, 1886. If the statute of limitations is a defense to such an action as this, then the statute did not begin to run until the filing of the quitclaim deed, and was not a bar at the time this suit was begun.

5. The final contention of the appellants is that both the district court and this court ignored the statute of frauds pleaded by the defendants as a defense to the action of Pleasants. It seems to be the opinion of the learned counsel for appellants that because a deed was not made and delivered by Boyd to Pleasants at the time of his purchase of the lot, Pleasants cannot be heard to claim title to this lot, and his only remedy is to sue Boyd for the purchase money. But this is not an action by Boyd against Pleasants to compel him to convey the real estate mentioned. The question here is one of equities between two parties holding deeds for the same property from the same grantor, and we confess our inability to see that the statute of frauds is applicable. It may be that this inability on our part is unpardonable, but the fact remains that we are unable to comprehend that which to the learned counsel seems so lucid. The former opinion of this court is adhered to.

**AFFIRMED.**

Post, J., not sitting.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF  
OMAHA, V. MAYOR AND CITY COUNCIL OF THE  
CITY OF OMAHA.

FILED MARCH 20, 1894. No. 6773.

1. **School Tax: BOARD OF EDUCATION: CITY COUNCIL.** Section 21 of subdivision 17, chapter 79, Compiled Statutes, relating to schools in metropolitan cities, does not grant to the board of education authority to determine what amount of funds must be raised by taxation for the support of schools, or what levy is required for that purpose, but it requires the board of education to report to the city council an estimate of the total amount of funds required for the purposes specified in the section, and leaves with the city council the power to determine what proportion of this amount will be realized from sources other than taxation, what amount it is necessary to raise by taxation, and the levy required for that purpose.
2. ———: **MANDAMUS TO CITY COUNCIL.** Therefore, where the board of education reports to the council the total amount of funds required, with an estimate of the proportion thereof which it will be necessary to raise by taxation, the council cannot by *mandamus* be required to make a levy sufficient to raise the amount so reported as necessary to be raised by taxation.

ORIGINAL application for *mandamus*.

*James B. Meikle*, for relator, cited: *State v. Smith*, 11 Wis., 65; *People v. Bennett*, 54 Barb. [N. Y.], 480; *Atkins v. Disintegrating Co.*, 18 Wall. [U. S.], 301; *Taylor v. Taylor*, 10 Minn. 107; *Bourland v. Hildreth*, 26 Cal., 182; *Kennedy v. Gibson*, 8 Wall. [U. S.], 498; *Donohue v. Ladd*, 31 Minn., 244; *Big Black Creek Improvement Co. v. Commonwealth*, 94 Pa. St., 455; *Follmer v. Nuckolls County*, 6 Neb., 204; *People v. Commissioners of the Ill. & M. Canal*, 3 Scam. [Ill.], 153; *Mayor of Jeffersonville v. Weems*, 5 Ind., 547; *Commissioners of La Grange County v. Cutler*, 6 Ind., 354; *Stayton v. Hulings*, 7 Ind., 144; *Hedrick v. Kramer*, 43 Ind., 362; *State v. Forkner*, 70 Ind., 241; *Bell v. Davis*,

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State v. Mayor and City Council of the City of Omaha.

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75 Ind., 314; *State v. Canton*, 43 Mo., 48; *People v. Lacombe*, 99 N. Y., 43; *People v. Commissioners of Taxes of New York City*, 95 N. Y., 558; *Burch v. Newbury*, 10 N. Y., 389; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 461; *Donaldson v. Wood*, 22 Wend. [N. Y.], 397; *Waterliet Turnpike Co. v. McKean*, 6 Hill [N. Y.], 619; *Commonwealth v. Kimball*, 24 Pick. [Mass.], 370.

*W. J. Connell, City Attorney, contra*, cited: *Kemerer v. State*, 7 Neb., 130; *People v. Yeates*, 40 Ill., 126; *Merrill, Mandamus*, sec. 291; *Smails v. White*, 4 Neb., 353; *In re House Roll No. 284*, 31 Neb., 505; *Sovereign v. State*, 7 Neb., 412.

IRVINE, C.

The facts in this case are undisputed. Omaha is a city of the metropolitan class, and by virtue of subdivision 17 of chapter 79, Compiled Statutes, the territory embraced in that city is constituted a corporation for school purposes, governed by a board of education. The board of education, on the 22d day of January, 1894, made an estimate of the amount of funds required for school purposes, and on the following day reported that estimate to the city council. This estimate contained items of proposed expenditures amounting to \$389,351. As against this there were itemized estimates of resources other than from taxation, and an item "to be made up by taxation, \$70,000." This was followed by an estimate that it would require a levy of three and one-half mills on the dollar to supply this amount, and a request was made to the council that a levy to that amount should be made. The assessed valuation of the city of Omaha is \$20,322,201. Upon the 6th of February an ordinance was passed by the city council making a levy of taxes for numerous purposes, including therein a levy of three mills on the dollar for the school district. The relator seeks to compel the mayor and council to make

a levy of three and one-half mills, or such a levy as will be sufficient to raise the sum of \$70,000. The statute under which the relator claims authority to require this levy is as follows: "That the board of education shall annually, during the month of January, report to the city council an estimate of the amounts of funds required for the support of the schools, for the purchase of school sites, the erection and furnishing of school buildings, the payment of interest upon all bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness, and the city council is hereby authorized and required to levy and collect said amount, the same as other taxes." (Comp. Stats., ch. 79, subd. 17, sec. 21.)

The question presented is simply this: Does the law empower the board of education to determine the amount necessary to raise by taxation and the levy required therefor, and compel the council, acting ministerially, to make a levy sufficient to provide the amount so determined? Or, on the other hand, is the board simply authorized to report to the council the whole sum required for school purposes, leaving with the council, in the exercise of its discretion, the power to determine what part of that sum must be raised by taxation and what levy will be sufficient for that purpose?

The argument made on behalf of the relator is very able and demands close consideration. It is argued that the manifest intent of the statutes relating to the schools is to vest in the school district, through its board of education, sole legislative power. By the act relating to schools in metropolitan cities, being subdivision 17 of chapter 79, Compiled Statutes, already referred to, the school district is constituted a body corporate. The title to all school property is vested in the district. The board of education is given exclusive control of the property for all the purposes contemplated in the act. All schools are placed under the direction and control of the board of education. The

affairs of the school district are to be conducted exclusively by the board of education, except as otherwise provided in the act. The board is required to provide for the payment of the indebtedness of the school district, including the bonded indebtedness. Different qualifications are provided for electors of the school district than those required for general electors of the city. The board of education canvasses the vote at school elections. The board disburses school funds; and, in general, it is clear that it was the policy of the law to make the school district independent of the city government, so far as practicable. These features, however, existed in the act of February 6, 1873, providing for public schools in cities of the first class.

*State v. Mayor and Council of the City of Omaha*, 7 Neb., 267, was a case precisely like the one at bar, arising under the act of 1873, Omaha being then a city of the first class. The report of that case contains no adequate statement of facts, and the language of the opinion lacks certainty, owing to the want of such a statement, but a reference to the briefs in the case shows that all the arguments here advanced by the relator were presented in that case, and all the authorities now called to our attention were there cited. The conclusion there reached was that the power of the board was merely to report an estimate of the funds required; that the board had no power to levy a tax, but that it was for the council, in the exercise of its discretion, to make such levy, and the writ was accordingly denied. The statute there under consideration differed from the one here invoked only in one respect. The language of that statute was: "The city council is hereby authorized and required to levy and collect the necessary amount, the same as other taxes." Here the language is "said amounts." In the brief on behalf of relator in the former case it was argued that the terms "amounts of funds required" and "necessary amounts" were synonymous, and we think that such argument was sound so

far as applied to those particular expressions. The necessary amount can be neither more nor less than the amount required; so we cannot see that the expression "said amounts," if it should be construed as referring back to the expression "amounts of funds required," can be given any different construction than the term "necessary amounts" used in the other statute. This being the only difference between the statutes applicable in the former case and in that now before us, it would seem that the former case should be treated as a decision controlling us here. Owing, however, to the uncertainty of the published report of the case in 7 Neb., an uncertainty which has led to continued litigation upon this question, we think it proper to pursue the subject further.

In this state, taxation of property within the school district is not the only source of income for the support of the schools. In fact, if the estimate presented by the board of education to the city council in this case approaches accuracy, the school tax forms but a small portion of the school fund. All license fees go to that fund, estimated in this case at \$220,000. So all fines arising out of the police court, estimated at \$25,000. From the state apportionment of the school funds a further estimate is made of \$60,000. The statute does not require the board of education to estimate the amount of funds to be derived from sources other than taxation and to report to the city council simply the amount required to be raised by taxation, but requires an estimate of the whole amount required for the support of the schools and other purposes specified in the act. We think the obvious purpose of the act was to require an estimate to be made and reported to the council of the character designated in the act,—that is, of the total amount of funds required for the different purposes,—and that it was intended that the council should, having received this estimate, for itself determine what amounts would probably be realized from sources other than taxation

and then determine what taxes it would be necessary to levy in order to provide the board of education with the total amount estimated by it as necessary. It is true that in regard to some of the sources of revenue the board of education has facilities equal to those of the council for forming an estimate. This is not, however, in all cases true. All fines and licenses go to the school fund, and the mayor and council have authority, by ordinance, to impose certain licenses, and to a certain extent, in the exercise of their legislative powers, to fix the amount of the fines collectible. Further, it must be borne in mind that the act relating to schools in metropolitan cities is, in all essentials, a copy of the act of 1873 relating to schools in cities generally, and that that act was in effect during a period when councils also had the power of granting saloon licenses. In metropolitan cities this power is now committed to the board of fire and police commissioners, but the mayor and council may still fix within the limits of the statute the amount to be paid for such licenses. For this reason the mayor and city council, and not the board of education, is the body in the best position to estimate the receipts of the school district, and so to determine the amount necessary to raise by taxation, and this fact is important in ascertaining the legislative intent in regard to the statute we are considering.

Our attention is called to several cases which it is claimed sustain the position of the relator. The first of these is *Ex parte The Common Council of Albany*, 3 Cow. [N. Y.], 358. In that case it was held that the council could by *mandamus* compel the supervisors to levy a tax sufficient to raise the sum reported by the council as necessary for the support of the poor. But the statute there committed to the council the power to determine the sum necessary "to be raised by taxation" for that purpose. In *People v. Bennett*, 54 Barb. [N. Y.], 480, a *mandamus* was granted to compel the levy of a school tax for Saratoga Springs,

but it does not appear that the board of education had any other source of income than the tax, and the statute required the trustees of the village to raise and collect by tax such sums as "the board of education should deem needful." In *State v. Smith*, 11 Wis., 65, a similar *mandamus* was allowed, but there the charter of the city expressly required the council to raise by taxation "such sums as may be determined and certified by the board of education to be necessary and proper," in addition to the amount of moneys appropriated or provided by law. In all these cases the statute was explicit and clearly left to the levying body only a ministerial duty to perform. Were our statutes as plain, or were taxation the sole source of income, we might adopt a similar view, but we think that it was intended by our statute merely that the board of education should notify the council of the total amount required, and that to the council is committed a discretionary authority to estimate the receipts from different sources and for itself determine what tax will be necessary to make the total income sufficient to provide the total amount reported by the board. It is true that in *State v. Paddock*, 36 Neb., 263, a *mandamus* was allowed on behalf of the school district of South Omaha against the commissioners of Douglas county upon substantially similar statutes and under a very similar state of facts. An inspection of that case will show, however, that the allowance of the writ was resisted only upon two grounds. One of these related to the time when the estimate was reported to the commissioners. The other question in the case was as to whether it was the duty of the city council or the county commissioners to make the levy. This depended upon the further question as to whether South Omaha was a city of the first class or a city of the second class. The question now before us was not in that case. The refusal of the commissioners to make the levy being put upon entirely other grounds, and the question as to whether or not the

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 McKnight v. Thompson.
 

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writ was controlling the exercise of a discretionary power not being before the court, that case cannot be considered as a precedent for this.

WRIT DENIED.

Post, J., not sitting.

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AARON MCKNIGHT V. SAMUEL THOMPSON ET AL.

FILED MARCH 21, 1894. No. 4998.

1. **Vendor and Vendee: MISREPRESENTATIONS: DECEIT.** Ordinarily, a mere misrepresentation of the value of real estate which is the subject-matter of the contract is not actionable, although falsely and fraudulently made by the seller and relied upon by the buyer.
2. ———: ———: **RESCISSION OF SALE.** The rule is otherwise where the purchaser resides a considerable distance from the location of the land, is ignorant of its value, and is prevented from examining the property or from making inquiries as to its condition and value by trick or fraud of the vendor.

ERROR from the district court of Hitchcock county.  
Tried below before COCHRAN, J.

*J. W. Cole*, for plaintiff in error, insisting that the petition states a cause of action, cited: *Phillips v. Jones*, 12 Neb., 213; *Tal'on v. Ellison*, 3 Neb., 74; *Faulkner v. Klamp*, 16 Neb., 178; *School District v. Randall*, 5 Neb., 411.

*J. Byron Jennings, contra.*

No brief filed on behalf of defendants in error.

NORVAL, C. J.

Aaron McKnight traded to Samuel Thompson and John Crats a stallion, and took in exchange therefor three lots in

the city of Topeka, Kansas. McKnight brought this action in the lower court for a rescission of the contract, or, if rescission cannot be had, for damages on account of alleged fraudulent representations of the defendants in the trade of the lots. The district court sustained a general demurrer to the petition and dismissed the action; to reverse which ruling plaintiff brings the case here on error.

The petition charges, among other things, in substance, that on the 25th day of March, 1890, the defendants, conspiring and confederating together to cheat and defraud plaintiff, represented that the defendant Thompson was the owner of lots 299, 297, and 301, on Kolon avenue, Jenkins M. Morris' addition to the city of Topeka, Kansas, and, for the purpose of inducing plaintiff to trade for said lots, defendants represented to plaintiff that said lots were of the value of \$1,000, and that they were incumbered for the sum of \$650, and no more; that defendants, for the purpose of inducing plaintiff to rely upon their statements as to the value of said lots, read and delivered to plaintiff a letter bearing date of January 7, 1890, purporting to have been written by one V. Franklin, of the Citizens Bank of McCook, Nebraska, to the First National Bank of Topeka, Kansas, inquiring as to the value of said lots, with the pretended answer thereto of the cashier of the said First National Bank; that said pretended answer placed the value of said lots at \$350 to \$400 each. The petition further charges that said representations and statements of the defendants were false and untrue, and were known to be such by the defendants when made; that said lots were of no value whatever over and above the mortgage incumbrance thereon of \$650; that instead of the value of said lots having been placed at \$350 to \$400 each by said cashier in his said letter, their value was stated by him to be from \$150 to \$200 each, but that said defendants, for the purpose of defrauding plaintiff, changed and raised said figures; that plaintiff had never seen said lots

and was wholly ignorant of their value, but that, relying entirely upon the said statements and representations of the defendants, and believing the same to be true, and that said letter of the cashier was genuine and not forged, plaintiff was induced to and did give defendants in exchange for said lots a stallion of the value of \$500, and assumed and agreed to pay said incumbrance of \$650 on said real estate.

The question presented for our consideration is whether the petition was sufficient to entitle plaintiff to the relief demanded. Usually a mere assertion concerning the value of property made by the vendor is not actionable, although known by him to be untrue. In other words, a charge of fraud can seldom be predicated on the mere expression of an opinion, and representations or statements of the value of property are generally regarded of that character, and a vendor is not ordinarily warranted in placing any confidence in them. Such is undoubtedly the rule where the buyer is acquainted with the property and its value, or where he has negligently omitted to make inquiries for the purpose of ascertaining the real condition of the property. The rule, however, is otherwise where the purchaser resides at considerable distance from the location of the property which is the subject of the negotiations and is prevented from examining it or from making inquiries as to its value and condition by the fraud of the seller. In such case a false assertion concerning value will not be regarded as a mere expression of opinion, but will be treated as an affirmation of fact.

The supreme court of New York in *Chrysler v. Canaday*, 90 N. Y., 272, say: "The rule is well settled that a naked assertion by a vendor of the value of property offered for sale, even although untrue of itself, and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent

inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him. In this case there are facts proven which show artifice and conspiracy from the outset on the part of the defendant to cheat and defraud the plaintiff, who was put in communication with parties who aided in carrying out the deception and putting him under the influence of confederates who acted in collusion and with the palpable purpose to deceive and defraud him. The facts referred to would undoubtedly have great effect upon a jury, and if properly presented, would justify a verdict for the damages sustained." (See *Simar v. Canaday*, 53 N. Y., 298; *Lord v. French*, 61 Me., 420; *King v. Sioux City Loan & Investment Co.*, 76 Ia., 11; *Witherwax v. Riddle*, 121 Ill., 140; *Harris v. McMurray*, 23 Ind., 9.)

In *Simar v. Canaday*, *supra*, it was ruled that a statement made by the vendor, which is tantamount to an estimate of opinion, such as value, is not actionable, but that every assertion as to value of property sold is not regarded as a mere matter of opinion and belief; and whether it is merely the expression of an opinion, or an affirmation of a fact, is a question for the jury. Folger, J., in delivering the opinion of the court, observes: "And where they are fraudulently made of particulars in relation to the estate which the vendee has no equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damage sustained."

The Indiana case cited above was an action upon a note given for a part of the purchase price of a quarter section of land. The defendant set up in his answer that the plaintiff falsely and fraudulently represented the land to be of the value of \$33 per acre, and the soil rich, black loam, and that he had been offered \$32 per acre; that defendant had never seen the land nor been in the neighborhood of it; that before closing the purchase he started to

see it, but was turned back by plaintiff's repeating his representations, and stating if the neighbors did not say it was worth that much there would be no trade; that defendant relied upon said representations; that the land was not of the value stated, but was worth only \$18 per acre, and that such is the opinion of the neighbors; that urgent business called him to his home and he had no opportunity for three or four months of inquiring about, or going to see, the land. It was held that the answer stated a good defense.

The Iowa case was where a loan of \$800 was made upon eighty acres of land which the borrower, in his written application for the loan, had falsely and fraudulently represented to be of the value of \$30 per acre, when in fact it was not worth to exceed \$5. Relying upon the application, plaintiff accepted the securities and paid the money for them. On the discovery of the fraud he tendered back the securities and brought an action to recover the money. Upon these facts the trial court at the close of plaintiff's case directed a verdict for the defendant. The supreme court reversed the case, and in speaking of the written application in the opinion, say: "It was more than a mere general declaration of the value of the property, based upon the opinion of either Wellman or the general manager. It was the deliberate preparation of a statement for the information of persons seeking to invest money, and upon which they were invited to rely without an examination of the land."

In the case at bar the trade was made in this state, while the land was in another. Plaintiff had never seen the lots, nor was he acquainted with their value. He had no opportunity of examining them, and was prevented from so doing by reason of the false statements made by the defendants and the forged letter already mentioned. We think the facts set up in the petition, if true, are sufficient to entitle plaintiff to have the contract of exchange set aside on the ground of fraud, and that the district court

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In re Newton.

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erred in sustaining the demurrer to the petition. Judgment reversed and cause remanded.

REVERSED AND REMANDED.

Post, J., not sitting.

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IN RE REUBEN NEWTON.

FILED MARCH 21, 1894. No. 5507.

1. **Criminal Law: Costs: COMMITMENT FOR NON-PAYMENT.** A court or magistrate, upon entering judgment in a criminal prosecution against a prisoner, may order that he shall stand committed until the fine and costs are paid, or secured to be paid.
2. **Imprisonment for the non-payment of fines and costs** is no part of the punishment, but is merely one of the means of enforcing compliance with the order of the court.
3. **Criminal Law: Costs: DISCHARGE OF PRISONER.** Where the offender is unable to pay the amount adjudged against him he may obtain relief under section 528 of the Criminal Code.
4. ———: **APPEAL: RECOGNIZANCE.** Under section 324 of the Criminal Code a defendant in a criminal case, in order to appeal from a judgment of a magistrate to the district court, must, within twenty-four hours after the rendition of the judgment, enter into a recognizance as required by said section.

ERROR to the district court for Antelope county. Tried below before ALLEN, J.

*B. B. Willey*, for petitioner:

The time of imprisonment must be limited in the judgment and set forth in the commitment upon which the prisoner is held in custody; otherwise the judgment and commitment, being indefinite, are void. (Maxwell, Pleading & Practice, 753; *State v. Prince*, 8 So. Rep. [La.], 591;

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*Howard v. People*, 3 Mich., 210; *Lowrey v. Hogue*, 24 Pac. Rep. [Cal.], 995; *Robson v. Spearman*, 3 Barn. & Ald. [Eng.], 493; *Washburn v. Belknap*, 3 Conn., 502; *Elliott v. People*, 13 Mich., 375; *Crippen v. People*, 8 Mich., 117; *La Roe v. Roeser*, 8 Mich., 540; *Ex parte Soto*, 26 Pac. Rep. [Cal.], 530.)

The county judge should have accepted and approved the appeal bond offered by the accused. (*Monell v. Terwilliger*, 8 Neb., 362; *White v. German Ins. Co.*, 15 Neb., 660; *Berrer v. Moorhead*, 22 Neb., 691.)

*O. A. Williams, County Attorney, contra.*

No brief for defendant in error.

NORVAL, C. J.

This was a petition to the district court of Antelope county, by Reuben Newton against George P. Haverland, sheriff of said county, for a writ of *habeas corpus*. From a judgment denying the writ the petitioner prosecutes error.

The petitioner was tried and convicted in the county court of Antelope county of committing an assault upon one Herman Peiper, and was adjudged by the court to pay a fine of \$10 and costs and stand committed until the amount of such fine and costs were paid. In default of payment of the fine and costs the court issued a *mittimus*, and the accused was committed to the county jail. Thereupon he instituted these proceedings.

The first point made by counsel for petitioner is that the judgment, or rather that portion of it which requires that the accused be imprisoned until the fine and costs are paid, is unauthorized and void. An assault is punishable by fine or imprisonment, or both. (Criminal Code, sec. 17.) By section 322 of chapter 29 of the Criminal Code, entitled "Trial of Minor Offenses Before Magistrates," it is provided that "whenever the defendant shall be tried under the provisions of this chapter, and found guilty either by

the magistrate or jury, or shall enter a plea of guilty, the court shall render judgment thereon, assessing such punishment either by fine or imprisonment, or both, as the nature of the case may require and the law permit; in such case the defendant shall, in addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with," etc. Sections 500; and 501 of the Criminal Code are as follows:

"Sec. 500. In all cases wherein courts or magistrates have now or may hereafter have the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, the said courts or magistrates may make it a part of the sentence that the party stand committed and be imprisoned in the jail of the proper county until the same be paid, or secured to be paid, or the defendant is otherwise discharged according to law.

"Sec. 501. In every case of conviction of any person for felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of prosecution against the person convicted."

The last two sections were before this court for consideration in *Re Dobson*, 37 Neb., 449, in which case it was held that it was the duty of a court, upon the conviction of a person of a crime, to render a judgment for the costs of prosecution against the defendant, and that the court possesses the power to include in the sentence that the person convicted be imprisoned in the county jail until the costs are paid, or security be given for their payment. We adhere to the opinion in the case just mentioned. Authority is likewise conferred upon a court or magistrate to impose imprisonment on a defendant for the non-payment of a fine, convicted as the petitioner was. Such power is derived from sections 322 and 500 copied above. The first section declares that "in such case the defendant shall, in

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addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with ;” and substantially to the same effect is section 500. Therefore, there is double statutory authority for rendering judgment of imprisonment for non-payment of fine and costs. Even at common law, courts had the power to imprison a defendant until the fine and costs were paid. (Bishop, *Crim. Proc.*, sec. 1301; *Brown v. People*, 19 Ill., 613; *Hill v. State*, 10 Tenn., 247.)

Another ground upon which petitioner insists his imprisonment is unlawful is that he was ordered committed to jail for an indefinite period of time. We concede that imprisonment, as a punishment for crime, should be for a definite period, and that a sentence to an indefinite term of imprisonment is illegal ; but the judgment under consideration does not violate the foregoing rules. The penalty imposed upon the petitioner is pecuniary merely. The imprisonment adjudged in this case forms no part of the punishment *per se*, but is one of the means of enforcing compliance with the judgment of the court. The fine and costs inflicted constitute the punishment, and under the statute they may be satisfied by the voluntary payment of the amount thereof, or by collection under execution issued against the property of the defendant, or by imprisonment in the county jail in case the defendant is unable to pay the same.

It is urged that under section 528 of the Criminal Code the county court should have fixed the number of days the petitioner should be confined for non-payment of the fine and costs. This section reads as follows: “Whenever it shall be made satisfactorily to appear to the district court, or to the probate judge of the proper county, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of said court

or judge to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs; *Provided*, That nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, nor until the convict shall have been imprisoned at least one day for every three dollars of the amount adjudged against him." Clearly the language quoted did not make it the duty of the court in passing sentence to fix the length of time petitioner should be committed to jail in default of the payment of the fine and costs imposed. Under the other statutory provisions already referred to the court was empowered to commit the petitioner until the judgment of fine and costs was complied with. Section 528 was enacted for the purpose of authorizing the discharge of a prisoner from custody who is unable to pay the fine and costs. Its object was not to require the court or magistrate in passing sentence upon a prisoner to specify the number of days he should be imprisoned for the non-payment of the amount imposed as a punishment. It is perfectly manifest the court cannot know, when judgment is being pronounced, that the fine and costs will not be paid, or that the same cannot be collected by legal process. It is only after all legal means for the collection of the fine and costs have failed that a prisoner is entitled to be discharged under section 528, and not then unless he has been imprisoned at least one day for each three dollars of the sum imposed. Our conclusion is that the county court did not exceed its powers in imprisoning the petitioner until the fine and costs were paid. (*Ex parte Bollig*, 31 Ill., 88; *Ex parte Bryant*, 4 So. Rep. [Fla.], 854; *In re MacDonald*, 33 Pac. Rep. [Wyo.], 18.) We have examined the authorities cited in the brief of petitioner, holding that imprisonment for the non-payment of a fine is illegal, but

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as they are based upon statutory provisions materially different from our own we cannot follow their lead.

It is finally urged that the judgment and sentence of the county court were superseded by an appeal. If this were true, the petitioner would be entitled to his discharge. Section 324 of the Criminal Code, regulating appeals to the district court from tribunals inferior thereto, in criminal cases provides that "the defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings upon such judgment. No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him," etc. The record shows that petitioner was tried on May 9, 1892, and at 3:15 P. M. of said day the jury returned a verdict of guilty, and thereupon the court sentenced the prisoner. Although notice of appeal was immediately given, no appeal undertaking was offered or tendered to the court until 5:20 P. M. of the next day. This was not in time, since more than twenty-four hours had elapsed after sentence was pronounced. The court had no power to extend the time fixed by statute for taking an appeal. The judgment of the district court is

**AFFIRMED.**

Post, J., not sitting.

H. A. MERRILL, APPELLANT, V. JAMES E. JONES ET  
AL., APPELLEES.

FILED MARCH 21, 1894. No. 5539.

**Tax Liens: FORECLOSURE: ATTORNEY'S FEES.** In an action to foreclose certificates of tax sale, during the litigation, and before trial or decree in the case, the owner of the property covered by the lien of the taxes evidenced by the certificates in suit tendered to the plaintiff in the case, owner and holder of the certificates, the total amount of the principal debt, interest and costs, then accrued. *Held*, That the plaintiff was not entitled to an award of any sum as an attorney fee to be taxed as a part of the costs in the case, as provided by section 181, chapter 77, Compiled Statutes of Nebraska, entitled "Revenue."

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

*Henry W. Pennock and Webster, Rose & Fisherdick*, for  
appellant.

*S. L. Geisthardt*, contra.

HARRISON, J.

In this case the appellant filed a petition in the district court of Lancaster county, containing sixteen separate causes of action, and alleged the purchase, by plaintiff, of sixteen tracts of land in said county, belonging to defendants, at a tax sale held December 8, 1888, also the payment by plaintiff of various sums, taxes on the premises, prior and subsequent to the date of sale; and further alleged that no tax deeds had ever been executed, or any application made for the same. The prayer of the petition was for a finding of amount due, a foreclosure of the tax certificates or liens, and sale of the premises; also, for an allowance, as an attorney's fee, of an amount equal to ten per

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cent of the amount determined to be due the plaintiff, to be awarded and taxed as part of the costs in the action.

Defendant Carlos C. Burr answered, admitting that he was the owner in fee of all the land described in the sixteen causes of action in the petition of plaintiff; denied that plaintiff owned the tax certificates set forth and described in the petition, and also denied that there was any sum due upon the certificates or either of them. The answer further alleges that immediately prior to the date of the commencement of his ownership of said lands his co-defendant, James E. Jones, was the owner in fee of said premises. The answer further states that no notice was given by plaintiff, or any one for him, to Jones, or the answering defendant, Burr, personally, or by publication or otherwise, of any claim of plaintiff against the lands, or of any purchase of them by him at tax sale; that the assessor of said lands for the year of sale (1877) did not take or subscribe any oath; that the schedules and assessment rolls or lists for 1877 had no oath of the assessor attached thereto, and no oath of the assessor was contained therein, and hence they were invalid, and the taxes assessed and levied thereon were invalid and were not liens on the lands; that a large number of the items of taxes (enumerated in the answer), contained in the certificates of sale issued to plaintiff when he paid the taxes and sought to be foreclosed in this action, were levies of taxes made upon valuations of the property, which valuation had been raised by the board of equalization without any notice to plaintiff or his grantor, James E. Jones, and were void and not liens upon the lands. This answer was filed January 9, 1892.

February 10, 1892, plaintiff filed a reply, in which he admitted Burr's ownership in the lands, also admitted that no notice of tax sale, as a condition precedent to demand for tax deeds, had ever been served upon the owners of the lands as required by the statutes; and further denied each and every other allegation of the answer.

On March 30, 1892, defendant Burr filed a supplemental answer, in which he set forth that on March 29, 1892, he tendered to plaintiff, or to his attorney and agent, Halleck F. Rose, the sum of \$3,718.70, as payment in full of all the several amounts due in the causes of action contained in plaintiff's petition, also the further sum of \$40.50 costs of the action, being in all \$3,759.20, which was sufficient to pay the amounts due in full and costs of action in full; that plaintiff refused to receive the money so tendered, and still refuses, and the answer contains the further offer of defendant to bring the money into court. (We will here state that the money was produced in court by defendant and there refused by plaintiff.)

Plaintiff, in reply to this supplemental answer of defendant, admitted the tender, in amount and for the purpose stated in the answer, and the refusal to accept the same by plaintiff, and denied each and every other allegation of the answer, and alleged that he had notified defendant Burr personally, and also by letter, of plaintiff's ownership of the tax certificates in suit before beginning the action, and requested or demanded payment of the amounts due upon the certificates, and informed defendant that if payment was not made plaintiff would institute action upon them, and that defendant refused to pay the amounts due; that the tender was not made until after the action was commenced, and that it was made now solely to defeat plaintiff's recovery of costs accrued and hereinafter to accrue in this action.

April 18, 1892, judgment was rendered for the amount of principal and interest due upon the certificates, foreclosing the liens and ordering sale of the lands. There was also a finding that the tender was made as pleaded in the supplemental answer of Burr; that plaintiff was not entitled to recover any attorney fee, and the recovery of an attorney fee of ten per cent was denied plaintiff.

The case is brought here on appeal by the plaintiff, and

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the sole complaint made is of the action of the court below, by which the plaintiff was denied the recovery of the sum, equal to ten per cent of the amount ascertained to be due upon the tax certificates, as an attorney's fee. Section 181, chapter 77, Compiled Statutes of 1893, entitled "Revenue," is as follows: "In any case in which the plaintiff shall recover in an action for the foreclosure of tax liens, as provided in this act, he shall be entitled to interest on each amount paid by him, and evidenced by his certificates of tax sale and receipts for taxes paid, at the rate of twenty per cent per annum from the date of each payment for the term of two years, and at the rate of ten per cent per annum on each of said amounts from and after the expiration of said two years, and until the rendition of the decree of foreclosure, which decree shall draw interest as in other cases. At the time of the rendition of such decree, the court shall award to the plaintiff an attorney's fee equal to ten per cent thereof, which shall be taxed as a part of the costs in the action." In the case at bar it is not disputed that the tender was made, and of sufficient amount to extinguish the entire indebtedness and the costs of the action, save and except the attorney's fee, if any allowed. There is no conflict or controversy over the facts, and our only inquiry is, did the tender by the defendant, of the full amount of the liens, interest and costs, defeat the right of plaintiff to recover, as a part of the costs in the case, an attorney fee to be calculated upon the amount found due at the time of the rendition of the decree in the case?

This case, in its essential features, bears a very close resemblance to one in which the maker of a note, mortgage, or other instrument agrees in such instrument to pay a certain per cent of the judgment rendered, or recovery allowed, upon the note or other instrument, as an attorney fee. On February 18, 1873, an act passed the legislature of this state on this subject, with reference to instruments for the payment of money only, which was as follows:

"That in all actions brought for the foreclosure of a mortgage, or upon a written instrument for the payment of money only, there shall be allowed by the plaintiff, upon a recovery of judgment by him, a sum to be fixed by the court, in addition to the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or written instrument upon which the action is brought shall in express terms provide for the allowance of an attorney's fee." (Gen. Stats., p. 98.) It will be noticed from the above quotation that it is "upon the recovery of judgment" that the party becomes entitled to the assessment of the attorney fee, and the taxation of it as a part of the costs. It is conceded, by all the parties to this case, to be the established rule of this court that "attorneys' fees are in the nature of costs, when allowed by the court, and should be taxed as such and kept separate from the judgment." The allowance of the fee is no part of the judgment for the debt itself. (See *Rich v. Stretch*, 4 Neb., 186; *Dow v. Updike*, 11 Neb., 95; *Hendrix v. Rieman*, 6 Neb., 517.) In *Rosa v. Doggett*, 8 Neb., 48, it was held in an opinion written by MAXWELL, C. J., "No attorneys' fees can be allowed except in cases where a judgment has been recovered."

We call attention particularly to that portion of the law above quoted, and the decisions construing it, where it is definitely and clearly stated that the amount of the attorney's fee and its allowance is based upon the judgment and made to depend upon the recovery of a judgment. The law governing in the case at bar provides, as to the attorney's fee: "At the time of the rendition of such decree, the court shall award to the plaintiff an attorney's fee equal to ten per cent thereof, which shall be taxed as part of the costs in the action." It is provided in another section of the act in question in regard to "Revenue:" "The owner of any certificate or certificates of tax sale \* \* \* may \* \* \* proceed by action \* \* \*

to foreclose the same, and cause the tract or lot to be sold for the satisfaction thereof, \* \* \* in all respects as far as practicable, in the same manner and with like affect as though the same were a mortgage executed to the owner of such certificate or certificates for the amount named therein," etc. It will be gathered from the foregoing that in this case we have the right given to award attorney fees as costs, to be taxed as costs; the time of such award, the rendition of the decree; the amount, equal to ten per cent of the decree; and the action, one in the nature and to be governed by the rules of procedure, etc., applicable to mortgage foreclosures. It seems quite clear that the reasoning and rules in the cases of actions for foreclosure of mortgages or judgment upon instruments for the payment of money only, containing an agreement for the allowance of an attorney fee to be taxed as costs, should be equally forcible in the action under consideration. They differ most materially probably, in that the former is one where the right to tax the fee arises out of an act of the party, of his own will and choice, and in the latter, from nothing of his own choosing or determination, but purely by operation of law. It cannot be disputed that if a tender is made in an action of foreclosure or for the amount due upon a promissory note, of the sum due, with interest and costs to date of tender, it will be sufficient, and any further proceedings in the case by plaintiff will be at his cost; and this, we think, is fully pertinent and forcible in the case we are discussing. The allowance of the attorney fee in all these cases is an incident to and dependent upon the rendition of a judgment or decree upon the principal indebtedness, and whatever works an extinguishment of the principal, or a right to a judgment or decree for it, draws with it the incident and dependent right.

The rule of tender was in force at the time of the passage of the act under which the plaintiff claims the relief sought for in this action, and was, and had been for many

years, recognized and applied by the courts, and there is no conflict between it and the right given to parties by the act of the legislature in question; and we see no reason why, where an action is brought to recover the amount of taxes and interest in the manner provided by the act of the legislature, it should be exempted from the general rule of the law, in regard to tender, which holds good in all cases of similar nature. We are satisfied that when the tender was made in this case, before the decree, of the whole amount of the principal debt, with interest and costs which had accrued and were, from the nature of the case, ascertainable, and by law were taxable at the time of tender, that if it had been accepted by plaintiff it would have extinguished the principal debt, and that the plaintiff could not have further maintained the action for the purpose of recovering or having the amount of the attorney fee, as costs, determined, and, when not accepted by the plaintiff, any further proceedings in the case were at his own cost; that inasmuch as the right to the award or allowance of the attorney fee had not, at the time of tender, attached, as there was as yet no judgment or decree, the plaintiff, by refusing the tender, could not further prosecute the case, for the purpose alone, it would seem, of reaching a judgment or decree for the same amount offered, and thus attain the recovery of the attorney fee as further costs. (*Jennings v. McKay*, 19 Kan., 120; 2 Jones, Mortgages, sec. 1607; *Schmidt v. Potter*, 35 Ia., 426; *Two Rivers Mfg. Co. v. Beyer*, 42 N. W. Rep. [Wis.], 232.)

The attorneys for plaintiff, in their brief, cite us to the case of *Hand v. Phillips*, 18 Neb., 593, and strenuously insist that it supports their view of the case in regard to tender, and that in the case the doctrine is announced that the attorney fees being in the nature of costs, a portion of them accrued when the petition was filed. The syllabus of the case cited is as follows: "Under a statute which authorizes the allowance of an attorney's fee in certain cases,

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proportioned to the amount of recovery, the debtor cannot, by paying a considerable portion of the debt immediately preceding the rendition of judgment, defeat the recovery by the attorney of fees upon the entire sum for which, but for the payment, judgment would have been rendered." The principal question involved in the case, as stated by the writer of the opinion (MAXWELL, J.) was, did a payment of a part of the mortgage debt, immediately preceding the entering of the decree of foreclosure, defeat the right to recover attorney's fees? and the answer is given to this in the negative. One of the cases cited by Judge MAXWELL in his opinion is *Dakin v. Dunning*, 7 Hill [N. Y.], 30, which was an action of assumpsit brought against Dakin, who, after issue joined, paid into court a sum of money which he claimed was all he owed Dunning, the plaintiff. A trial of the case was had, which developed the fact that the sum paid into court by defendant was not sufficient to pay the whole amount of the debt, or was only a partial payment. Defendant contended that this payment should be deducted as of the time made and a verdict, if any rendered against him, be for the balance. This, if done, would have reduced the amount recovered below the sum which it was necessary the plaintiff should recover to entitle him to costs in the case, and it was held: "Where the defendant resorts to the practice of paying money into court, but the sum thus paid was found by the jury to be less than was due at the time, the verdict and judgment should be for the whole amount of the plaintiff's demand, without any deduction on account of the payment. The defendant, however, is entitled to the benefit of the payment by way of indorsement upon the execution. If the sum paid into court is found by the jury to be equal to what was due at the time, the verdict should be for the defendant." And in the body of the opinion it was said: "The consequences which follow from the payment of money into court, in a proper case, are well settled in England. If the

amount brought into court is accepted by the plaintiff in satisfaction of his demand, his costs are to be paid by the defendant and the cause will thus be ended. But the plaintiff may insist that the amount paid is less than the actual indebtedness and proceed in the cause to recover the residue. In such case, if the sum paid into court is equal to what was due at that time, the verdict is to be for the defendant, but if the sum paid is short of that amount, the payment is to be allowed as a credit and a verdict found for the balance only. \* \* \* The former practice of the English courts may have been well enough there and worked no injustice to either party, and it might be proper here if our law as to costs was the same as that of England. The sum brought into court belongs to the plaintiff in any event, and in England, if he recovers anything beyond that sum, he is entitled to costs. But it is otherwise in this court, and in the courts of common pleas of the several counties. The plaintiff's right to costs in these courts often depends upon the amount of the recovery, and that right ought not to be impaired or affected by a payment into court, unless the amount thus paid is equal to the whole sum due at the time." The case of *Hand v. Phillips*, *supra*, was decided upon the same theory, and the principle announced in *Dunning v. Dakin* adopted and applied. But in the case at bar the facts are not the same or similar. Here the whole amount of the debt, interest and costs was tendered, and the only further litigation was over the question of the right to the attorney fee. A further fact in the case of *Hand v. Phillips*, which does not appear in the one at bar, was the fact that the defendant had filed no answer and practically confessed the plaintiff's claim, while in this case he was contesting it at every point, but certainly had a right to make payment and save costs if he so desired.

The plaintiff, it will be remembered, admitted that there was no notice to redeem served upon the defendant. It

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has been twice stated by this court, that where notice was not served upon the owner or occupant of the real estate to redeem, at least three months before the expiration of the time of redemption, that the failure of plaintiff to serve such notice may bar his right to recover costs where the owner or occupant tenders the amount due at the time suit is brought. (*Lammers v. Comstock*, 20 Neb., 341; *Helphrey v. Redick*, 21 Neb., 80.) But the time at which such tender must be made has not been accurately given, except that if it is at the time suit is brought, it may have the effect of throwing the costs upon the plaintiff. We do not place the decision in this case upon the fact that the notice was not served, but upon the fact of the tender of the amount due. That notice was not served strengthens our position, and possibly, if the above doctrine in regard to notice was followed in its full intended scope, it might have barred the plaintiff of the recovery of any costs.

The attorney for appellees has, in his brief, gone into the question of the constitutionality of the portion of the revenue act which allows attorney's fees as costs in an action to foreclose tax certificates; but as the conclusion reached in the case, so far as we have now considered it, will dispose of it and favorably to the contention of appellees as to the only point in the case, we do not deem it necessary to here discuss or decide the constitutional query. The decree of the court below was right and is

**AFFIRMED.**

Post J., not sitting.

## JOHN BARRETT V. JOSEPH PROVINCHER.

FILED MARCH 21, 1894.    No. 5141.

**Guardian and Ward.** After the death of his ward, a guardian cannot commence or maintain an action for the collection of a debt due such ward.

ERROR from the district court of Fillmore county.  
Tried below before MORRIS, J.

*F. B. Donisthorpe*, for plaintiff in error, cited: *Stinson v. Leary*, 34 N. W. Rep. [Wis.], 63; *Huntsman v. Fish*, 30 N. W. Rep. [Minn.], 455; *Jacobs v. Fouse*, 23 Minn., 51.

*John Barsby*, *contra*, cited: *Marlow v. Lacy*, 2 S. W. Rep. [Tex.], 52; *Alford v. Halbert*, 12 S. W. Rep. [Tex.], 75; *Fortson v. Alford*, 62 Tex., 580.

RYAN, C.

This action was commenced before a justice of the peace in Fillmore county, Nebraska, by the plaintiff in error, John Barrett, as guardian of Alanson Barrett, against the defendant in error, for the recovery of \$72.30 for work and labor performed by Alanson Barrett for the defendant. The record recites that during the cross-examination of plaintiff it was developed that Alanson Barrett, his ward, was dead, and that thereupon counsel for the defendant moved the court to dismiss the case for the reason that the plaintiff had no legal capacity to sue. The motion was sustained and the cause dismissed at the cost of plaintiff.

The sole question presented in this court is whether or not, under the circumstances described, the plaintiff, as guardian, could maintain an action against the defendant for such sum as the defendant owed for labor of the deceased ward. Plaintiff relies upon *Stinson v. Leary*, 34

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Richards v. Borowsky.

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N. W. Rep. [Wis.], 63, and on *Huntsman v. Fish*, 30 N. W. Rep. [Minn.], 455. In neither of these cases was the ward dead. He had merely reached the age of majority; and it was properly held that for the purpose of the adjudication of rights as between the ward and guardian the relation continued until a settlement was made. In the case at bar, however, the relation was terminated by the death of the ward. For the collection of whatever sums that were due the estate of the deceased, an administrator or executor was the only representative party who could properly maintain the action. The judgment of the district court approving the proceedings in the justice court was right and is

AFFIRMED.

Post, J., not sitting.

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ALLEN S. RICHARDS V. CHARLES BOROWSKY.

FILED MARCH 21, 1894. No. 5375.

1. **Instructions.** A party cannot be heard to complain that the trial court gave an instruction embodying only the same propositions of law given by the court at the request of the complaining party.
2. **Taxation of Costs.** To a review of the taxation of costs in the trial court a ruling on a motion to retax the same, together with an exception to such ruling, must be shown by the party seeking such review. Following *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 38 Neb., 904.

ERROR from the district court of Dakota county. Tried below before NORRIS, J.

*J. J. McAllister*, for plaintiff in error.

*Jay & Beck* and *J. B. Barnes*, contra.

RYAN, C.

Plaintiff, in an action for damages resulting from personal injuries inflicted by defendant, recovered judgment upon a verdict for \$1. The verdict was upon such conflicting evidence as to preclude disturbing it because not sustained by sufficient evidence.

Plaintiff in error complains that one instruction of the court made reference to an altercation between the parties which occurred on the day before that on which the injuries sued for were received. This instruction, however, warned the jury that the incidents of the first quarrel could not be considered as justifying injuries subsequently inflicted by defendant upon the plaintiff. The second quarrel seems to have commenced with such reference to the first as precluded the possibility of ignoring it. A history of the first quarrel was therefore given, that the language used in the second quarrel referring to the first might be understood. The court instructed the jury that the incidents of the first quarrel could only be considered for the purpose last indicated and not as a justification of any act in the second quarrel. Plaintiff requested and obtained an instruction embodying the same propositions as were embraced by the above instruction of the court. If there had been error in the instruction given by the court, which there was not, it would not have been available to a party upon whose motion a like instruction was given the jury.

Plaintiff in error complains that certain numbered instructions asked were refused, but as they are neither contained in the record nor referred to by the petition in error they cannot be considered.

It is insisted it was error, upon the recovery of but \$1 by plaintiff, that the costs, amounting to \$310.68, should be taxed to him. Possibly this might have been considered upon exceptions to a motion to relax costs. It cannot otherwise be reviewed in this court. (See *Real v. Honey*,

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Cahn v. Lipson.

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39 Neb., 516, and *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.) The judgment of the district court is

**AFFIRMED.**

Post J., not sitting.

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**BERNARD CAHN ET AL. V. JOSEPH LIPSON ET AL.**

**FILED MARCH 21, 1894. No. 4767.**

1. **Pleading: JOINDER OF NEW PARTIES DEFENDANT: DISCRETION OF TRIAL COURT.** The discretion of the district court in permitting the joinder of new parties defendant will not be reviewed unless prejudicial error is shown to have resulted from the manner in which such discretion has been exercised.
2. **Taxation of Costs: REVIEW.** An alleged improper taxation of costs cannot be presented in this court where no motion to retax the same has been made in the trial court. Following *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.

**ERROR** from the district court of Dawes county. Tried below before KINKAID, J.

*Spargur & Fisher*, for plaintiffs in error.

*E. S. Ricker*, contra.

**RYAN, C.**

Isaac Silverstein, in January, 1889, was a retail merchant at Chadron, Nebraska. On the 7th day of the month named he executed to Cahn, Wampold & Co. a mortgage upon his stock to secure the payment of \$1,258, due January 8, 1889. This mortgage was filed for record at 3 o'clock P. M. of the aforesaid 7th day of January.

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Cahn v. Lipson.

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On the day last named there was executed by Isaac Silverstein a mortgage to Frankenthal, Frendenthal & Co. on the same stock of goods to secure payment of the sum of \$1,472, due January 8, 1889. This mortgage was filed for record at 10:30 o'clock A. M. of January 7 aforesaid, being about four and one-half hours before the mortgage to Cahn, Wampold & Co. was filed. Silverstein, on January 7, 1889, made another mortgage to Austrian, Wise & Co., to secure payment of the sum of \$1,356.72, due January 8, 1889. This mortgage was filed for record one minute later than was the mortgage to Frankenthal, Frendenthal & Co., to which, by its terms, it was expressly made subject. It seems that a mortgage had been made on January 5, 1889, by Mr. Silverstein to the Bank of Chadron on the same property above referred to as having been mortgaged, and that the bank had immediately thereunder taken possession of the mortgaged property. The claim of the bank was satisfied by sales of a part of the goods mortgaged, and this suit was instituted in replevin by Cahn, Wampold & Co. against James C. Dahlman, sheriff, and Clement J. Davis, constable, of Dawes county, Nebraska. From the fact that the bank filed an answer it is inferable that the officers named were still in possession of the stock mortgaged at the time this action was begun. What were the averments of its answer are wholly matters of conjecture, unless resort is had to a copy substituted for the original answer shown to have been lost from the files. On motion of Cahn, Wampold & Co. this substituted answer was stricken from the files, so that even this reflected light as to the original answer is denied us. Before judgment was rendered, the bank and Clement J. Davis, constable, having been dismissed as parties, the firms of Frankenthal, Frendenthal & Co. and of Austrian, Wise & Co., respectively, filed answers whereby the priority of each firm over plaintiffs' mortgage, by virtue of the mortgage of each of said firms, was as-

serted and judgment was prayed accordingly in each of said answers. Motions were made to strike each of these answers from the files, which were overruled, and exceptions were thereupon duly taken; but each of said motions was afterwards followed by a reply putting in issue the averments of said answers. It is insisted there was error in permitting Frankenthal, Frendenthal & Co. and Austrian, Wise & Co. to answer, and in refusing to strike out the answer of each. No ground is pointed out upon which such error can be predicated, and we have been unable to find any such error. The firms with whom plaintiffs' litigation was had were, upon the face of the record of their mortgages, entitled to a priority of right of possession over the right of plaintiff. There was no error in admitting them as parties in this action to test the existence of such relative priorities. The evidence justified the finding of the court as to the value of the property in dispute, though there was evidence from which properly it could have been adjudged that such value was greater or was less than it was actually found. In view of these conditions the finding upon this point cannot be disturbed.

It is urged that the costs should not have been taxed against the plaintiffs, and that plaintiffs should have been allowed for the keeping and taking care of the property which was in dispute. It is possible that the items referred to might have been adjusted as costs in this case, and that upon motion for that purpose the taxation of costs generally would have been changed by the trial court. To a review of the question whether or not the trial court should have done so, a motion to that end should have been presented to, and acted upon by, that court precedent to its presentation in this court. (See *Real v. Honey*, 39 Neb., 516; *Bates v. Diamond Crystal Salt Co.*, 36 Neb., 904.)

There are other parties to this controversy, for instance Joseph Lipson, a judgment creditor of Isaac Silverstein;

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 Shrimpton v. King.
 

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but as no argument is made specially as against the rights of such other parties, they are omitted from the foregoing discussion in the interests of perspicuity. The judgment of the district court is

AFFIRMED.

Post, J., not sitting.

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**ALFRED SHRIMPTON & SONS v. H. P. KING.**

FILED MARCH 21, 1894. No. 5479.

**Failure to Obtain Ruling Upon Motion for New Trial:**

REVIEW. This court will not review, upon petition in error, alleged errors occurring during the trial of a cause in the district court, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Following *Jones v. Hayes*, 36 Neb., 526.

ERROR from the district court of Saline county. Tried below before HASTINGS, J.

*George H. Terwilliger*, for plaintiffs in error.

*J. D. Pope*, contra.

RYAN, C.

The plaintiffs in error were plaintiffs in the district court, and by petition therein filed claimed against the defendant a judgment for \$194.21, with interest and costs. The right to this judgment was predicated upon an alleged sale by the plaintiffs to the defendant of two great gross and one hundred and twenty-nine and two-thirds packages of pins. The defendant in his answer admitted that he ordered of the plaintiffs three gross papers of pins, for

39	779
48	615
39	779
45	208

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which he agreed to pay at the rate charged in the petition, that is, three and seven-eighth cents per paper, and that the total amount due was, at the time of the answer filed, \$16.74. The defendant, further answering, averred that before the action was brought he tendered to the plaintiffs in payment of said pins the sum of \$16.83, which plaintiffs refused to receive, and defendant alleged that he has ever since been, and still is, ready to pay that amount to the plaintiffs, but that plaintiffs refused to receive the same; and the defendant averred that with his answer he brought into court said sum and tendered the same to the plaintiffs. For a reply to this answer the plaintiffs denied each and every allegation therein contained. It would seem doubtful upon this condition of the pleadings whether or not judgment should have been rendered for at least the amount tendered. In the absence of a reply denying that that amount was due and denying the tender of it, most certainly plaintiffs should have recovered judgment for the sum admitted to be due and tendered. By replying, however, the plaintiffs put in issue the alleged tender as well as the fact averred by the answer, that that amount was due. Upon a trial had to the court, a jury having been waived, judgment was rendered generally in favor of the defendant and plaintiffs' cause of action was dismissed. There was filed a motion for a new trial, but in respect to that motion no action seems to have been taken; at least the record fails to disclose whether or not it was ruled upon and whether or not any exceptions were taken to any ruling. In the case of *Jones v. Hayes*, 36 Neb., 526, NORVAL, J., used the following language: "We cannot review the proceedings, for the reason the record fails to disclose that a motion for a new trial was presented to the trial court and its ruling obtained thereon. While the transcript contains the copy of a motion for a new trial, it does not appear that the attention of the court below was ever called thereto. It has been frequently decided by

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Simms v. Summers.

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this court that in order to review the proceedings of a district court by a petition in error a motion for a new trial must be made in that court and a ruling obtained on the motion. (*Cropsey v. Wiggenghorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Neb., 186; *Lichty v. Clark*, 10 Neb., 472; *Smith v. Spaulding*, 34 Neb., 128.)” The language quoted would seem to be decisive of the sole question presented for our consideration, and the judgment of the district court is therefore

AFFIRMED.

Post, J., not sitting.

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W. A. SIMMS ET AL. V. CHARLES E. SUMMERS.

FILED MARCH 21, 1894. No. 4827.

1. **Contracts: CONSTRUCTION.** When a contract is to be construed by its terms alone, without the aid of extrinsic facts, it is the duty of the court to interpret it.
2. **Guaranty: ACCOMMODATION NOTES: LIABILITY OF MAKERS.** Where parties agreed to vouch for another in the purchase of goods to the amount of \$100 each, and soon thereafter each executed to him an accommodation note to the amount named, which notes were taken by him and used in such purchase of goods, the parties thus having loaned their credit were subsequently in no way further liable than as evidenced by said notes and might purchase his stock of goods from the party whom they had thus accommodated, with the same rights and immunities as might any third parties and subject only to like disabilities.
3. **Contracts: THIRD PARTIES.** A party seeking to avail himself of the terms of a contract between other parties must do so subject to all its conditions and restrictions.

ERROR from the district court of Fillmore county. Tried below before MORRIS, J.

*Ong & Jensen and W. C. Sloan*, for plaintiffs in error.

*Edgar C. Ellis, Carson & Fifield, and F. B. Donisthorpe*,  
*contra.*

RYAN, C.

John H. Wright, in the fore part of the year 1890, was the owner of no property but his homestead; nevertheless he greatly desired to embark in the retail merchandising business in Strang, the village wherein he resided. There was one serious obstacle to this very laudable ambition—a total want of capital. At different times he presented these matters to F. H. Higgins, a traveling salesman, who, in the interest of the Grimes Dry Goods Company, of Kansas City, Missouri, occasionally visited the village of Strang, situated in Fillmore county, Nebraska, and from him received suggestions and advice as to his plans. It seems that he also consulted other philosophers of the peripatetic school with the same purpose, in each instance receiving the most disinterested encouragement. At length, in May of the year 1890, Mr. Wright was able to extend upon paper the terms of a contract to which if he could obtain the signature of a sufficient number of his neighbors having means, their credit would be his credit under the limitations of the proposed agreement itself. Mr. Wright was modest, as well as ambitious, and, therefore, when he learned that the attorney who managed the credit department of the aforesaid Grimes Dry Goods Company was attending court in Geneva, he forthwith visited the said attorney and submitted to him the writing relied upon as the basis of his credit scheme. This attorney having slightly amended the draft presented to him, approved the plan proposed. The approved writing, which Mr. Wright was thus encouraged to believe would meet a long-felt want, was in the following language:

“ We, the undersigned, hereby covenant and agree with J. H. Wright to vouch for him in the purchase of goods to run a general store to the amount of \$100 each. The period during which our names shall be used shall not be longer than one year from date of commencing said business, unless we shall at the close of such year, after making a careful examination of the condition of the store, see fit to continue our support. In consideration of allowing him to use our names in the purchase of goods, as above mentioned, J. H. Wright agrees to give each of us a discount of six per cent from the amount of goods we shall buy for our individual or family use, and we shall take out a coupon or pass book and shall be charged the regular retail price for goods, and in full settlement shall receive six per cent discount. It is further agreed that no claim, foreign or not pertaining to the proposed store, shall be paid out of any fund or stock of the store, for the reason that the said J. H. Wright owns and manages the store only by virtue of our vouching for him. Therefore, in case exigency of failure in part of J. H. Wright to be able to pay his bills, we, the below vouchers, then shall take into our hands the stock and employ a competent person to sell it to the best advantage possible and appropriate the proceeds to the payment of claims against the store and the expense of the sale. After which, if any amount remains, it shall be the property of said J. H. Wright. It is further a consideration of this agreement that the said J. H. Wright shall not buy to exceed one-third more than the total amount vouched for, and that the amount bought more than vouched for shall be at the risk of persons selling to him. The method of conducting the business shall be as nearly cash as possible. No note or account taken instead of cash shall be accepted without the approval of the bank, and no note or account shall run longer than sixty days without bearing ten per cent interest from commencement of the opening of such account. The banking busi-

ness shall be done with the Fillmore County Bank and the money taken in shall be deposited there at least once a week, and in payment of bills the said J. H. Wright shall check out of bank. It is also agreed that J. H. Wright shall offer to any grange or alliance, or other organization organized for financial benefits, a discount of four per cent on whatever goods its members may buy, except if they vouch equally with other vouchers they are to have the six per cent discount. It is hereby agreed that J. H. Wright shall have the privilege of using at least \$35 per month as monthly wages for the family expenses and making payments on his house and lot, and shall not exceed \$45 per month for his own family use. Also, the said J. H. Wright shall have the right to pay out from store the expenses of such store, such as freight, express, drayage, clerk hire, rent, etc.

"Subscribed and sworn to before me, a notary public, this — day of —, 1890."

This writing was never signed, and the evidence shows clearly that one or more plaintiffs in error never saw it or heard of its existence until after the collapse of Mr. Wright's enterprise. As none of the special findings of the jury have been attacked as wholly without the support of evidence, this lack of proof to conclude plaintiffs in error by the terms of this unsigned contract will receive no further notice and the said special findings will be assumed to be correct.

The evidence shows that about June 1, 1890, there were deposited in the Fillmore County Bank at Strang the accommodation notes of plaintiffs in error, payable to the order of J. H. Wright, as follows: That of George Whitman for \$100; that of Eli Schultz for \$100; that of W. A. Simms for \$100, and that of Ira Wright for \$200. There were other accommodation notes made to the order of J. H. Wright and deposited in the aforesaid bank, the aggregate amount of all the notes thus deposited, including

those of plaintiffs in error, being \$1,950. These were put into the bank by J. H. Wright to his own credit, and upon the faith of them he received accommodations at the bank to the amount of \$1,300. This last named amount Mr. Wright invested in goods with which he began business, and no signer of any one of these notes ever asked or received the benefit of the discount of six per cent, provided for in the written draft of contract above set out, upon such purchases as they made of Mr. Wright. If we found it necessary to review the special finding of the jury that the plaintiffs in error assented to this proposed contract, and under its provisions gave their accommodation notes, their failure to avail themselves of this the only provision to their advantage would of necessity be very important. As would naturally be expected, Mr. Wright found that the sum of \$1,300 was insufficient to enable him to carry on a profitable business. He therefore bought merchandise from wholesale houses on credit in several instances. On the 6th day of February, 1891, the plaintiffs in error claim that they purchased from J. H. Wright his stock of goods. They certainly went into immediate possession of the same as owners and remained in such possession until dispossessed by the sheriff. The consideration of this sale was \$2,400, according to the testimony of plaintiffs. The nineteen or twenty accommodation notes given J. H. Wright, and which were then in the Fillmore County Bank, were taken up as part of the above consideration, the amount paid therefor being \$1,150. One of the plaintiffs in error frankly admitted that one inducement to the purchase was to avoid payment of the full aggregate amounts of these notes (about \$1,950), which they would have been compelled to pay if they had not secured possession of the notes by paying the unpaid amount by the bank advanced on the faith of them. Of the balance of the \$2,400 consideration there was paid to H. P. Lau, a creditor of J. H. Wright, the sum of \$778; to Snyder & Loomis, also a

creditor, the sum of \$256; and the balance was paid in cash to J. H. Wright himself. This stock was afterwards seized by the defendant in error, the sheriff of Fillmore county, to satisfy a writ of attachment for \$603, including costs, in favor of Noyes, Norman & Co.; another writ of attachment in favor of Johnston-Fife Hat Company for \$253, including costs; another writ of attachment in favor of Gilmore & Ruhl for \$264, including costs; another writ of attachment in favor of J. T. Robinson Notion Co., for \$305, including costs; in all, the above attachments were for the aggregate sum of \$1,255 and \$200 possible costs. Each of the above writs issued from the district court of Fillmore county. In his answer in this suit in replevin brought by plaintiffs in error for possession of above stock, the sheriff set up the above writs of attachment and his levy thereunder upon the above stock as that of J. H. Wright, against whose property in each instance the above writs had issued. He also justified his seizure of said stock as the property of J. H. Wright under a writ of attachment issued from a justice court in favor of Tychsen & Reusch for \$46.05 and \$50 probable costs, and another writ of attachment in favor of Katz, Nevens & Co. for \$49.25 and \$50 probable costs. The question presented in the replevin suit was whether or not the rights of possession of the plaintiffs in error, as purchasers, were superior to those of the creditors of J. H. Wright under their writs of attachment above described.

The jury being required to answer seven special interrogatories, made such answers as enable us to consider certain questions of law, for whether each finding was sustained by sufficient evidence or not certainly cannot be questioned by the defendant in error. The special interrogatories as answered were as follows:

"Question No. 1. When J. H. Wright went into business in June, 1890, did not the plaintiffs, together with other parties, at and near Strang, Nebraska, enter into an

agreement with said J. H. Wright to vouch for him to the wholesale houses?

"In answer to question No. 1, we, the jury, say 'yes.'

"Question No. 2. Does the memorandum agreement introduced in evidence as Exhibit 'D,' and identified by the witness Wright, constitute the agreement between Wright and his vouchers referred to in question No. 1?

"In answer to question No. 2, we, the jury, say 'yes.'

"Question No. 3. Did the plaintiffs deposit their personal notes on one year's time in the Fillmore County Bank to the order of J. H. Wright and for the purpose of giving Wright credit with the wholesale houses?

"In answer to question No. 3, we, the jury, say 'yes.'

"Question No. 4. Was it a part of the consideration of the sale of the goods from J. H. Wright to the plaintiffs that the notes referred to in question No. 3, together with the other notes deposited for a like purpose, should be delivered back to their makers by J. H. Wright?

"In answer to question No. 4, we, the jury, say 'yes.'

"Question No. 5. What was the fair and reasonable value of the stock of merchandise transferred by J. H. Wright to the plaintiffs at Strang, Nebraska, and at the time of such transfer?

"In answer to question No. 5, we, the jury, say '\$3,650.'

"Question No. 6. Did the plaintiffs, at the time of the transfer to them of the property in controversy by Wright, know that by the terms of the purchase Wright was placing beyond the reach of his unsecured creditors all of his property that was liable to execution?

"In answer to question No. 6, we, the jury, say 'yes.'

"Question No. 7. Did J. H. Wright communicate to the plaintiffs his financial condition at the time of the transfer of the property in controversy by him to the said plaintiffs?

"In answer to question No. 7, we, the jury, say 'yes.'"

Following the above was a general verdict in favor of

the defendant in error, and the assessment by said general verdict of the value of the replevied property at \$3,650, and of the value of defendant's possession at \$1,983.21, upon which verdict judgment was duly rendered.

The above answers to the special interrogatories 1, 2, and 3 establish as facts that the draft of agreement prepared by J. H. Wright was assented to by the plaintiffs in error and governed the liability of plaintiffs in error to the parties who extended credit to J. H. Wright, among whom were included those creditors under whose writs of attachment the sheriff made his levies on the stock of goods in controversy and on whose behalf his defense was made in this action. The important question in this case arises upon the above three special interrogatories and the answers thereto, whereby the jury found that the accommodation notes on one year's time were deposited in the Fillmore County Bank for the purpose of giving Wright credit with the wholesale houses, and that the said deposits of notes by plaintiffs in error were made as required by the terms of the unsigned agreement hereinbefore referred to. Whether or not the unsigned memorandum of agreement (treated as signed) required the deposit of these notes for the benefit of the wholesale houses, was purely a question of construction of the terms of that instrument itself. In *Coquillard v. Hovey*, 23 Neb., on page 627, the rule applicable in such cases is laid down in the following language: "As we understand the rule for the construction of contracts, it is that, if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it." The jury interpreted the writing as an agreement by the plaintiffs in error to vouch for J. H. Wright to the wholesale houses—what particular wholesale houses was left wholly in doubt. The undertaking was that the signers of the contract should vouch for J. H. Wright in the purchase of goods to run a general store to the amount of \$100 each.

There is no room for doubt that each of the plaintiffs in error gave his accommodation note to J. H. Wright for a sum at least equal to \$100, and that these notes were used by Wright in the purchase of his original stock. In the body of the unsigned contract was the following provision: "It is further a consideration of this agreement that the said J. H. Wright shall not buy to exceed one-third more than the total amount vouched for, and that the amount bought more than vouched for shall be at the risk of the persons selling to him." This is the only provision in the unsigned contract having special reference to wholesale houses. Such houses, if they relied upon the provisions of the unsigned contract, must have taken them *cum onere*. The terms of the contract upon which reliance is placed by these houses advised them that each of the plaintiffs in error was pledging his credit only to the extent of one hundred dollars, and whoever proposed an extension of credit to Mr. Wright was bound to ascertain whether or not each plaintiff in error had already responded to the full extent to which his credit was pledged to be given. This would probably follow without the language above quoted. From its restrictive limitation there was no escape. The trial judge, however, seems to have assumed that the plaintiffs in error owed some duty toward wholesale houses which had extended credit to J. H. Wright aside from the duty to furnish Wright with credit only to the extent of \$100 each, for, at the request of the defendant, the jury was instructed as follows: "You are instructed that if you believe from the evidence that at the time J. H. Wright began business in June, 1890, plaintiffs and others entered into the agreement contained in the memorandum introduced in evidence as Exhibit 'D,' then plaintiffs could not make a valid purchase of the property in controversy from said Wright without assuming the liabilities of such wholesale houses as had furnished said Wright goods on the strength of said agreement," etc. This instruction was

clearly erroneous, for by the memorandum referred to no privity in any event was created as between the parties loaning a limited credit and the wholesale houses referred to. Not only so, but the limited credit required had been furnished by notes of plaintiffs in error deposited in the Fillmore County Bank before any credits whatever had been extended by either wholesale house to J. H. Wright. It was as though each plaintiff in error had agreed to sign with J. H. Wright a note for \$100, and had already done so when these goods were bought by Wright from the wholesale houses. As to such goods, it would not seriously be contended that the sureties on notes already given would be liable further because they had agreed to sign notes for \$100 each, and had already done so. Neither would it be seriously contended that because the sureties had signed said notes they were under obligations if they purchased the stock of goods of Wright to pay his debts other than those evidenced by the notes already signed. The instruction of the court given at the request of the defendant, however, laid down the rule that because the plaintiffs in error had agreed to vouch for Wright to the extent of \$100 each, that thereby they were precluded from dealing with Wright with reference to his goods in the same manner as though they had never so vouched for him. It may have been true that the transfer was fraudulent as against the creditors of J. H. Wright. That question was to be determined by the jury upon proper instructions applicable to the evidence under consideration. At most, the court should have gone no further than to instruct that the relations existing between Wright and plaintiffs, as shown by the evidence, were proper to be taken into consideration in determining whether or not the transfer complained of was fraudulent as against creditors of J. H. Wright. The judgment of the district court is

REVERSED.

Post, J., not sitting.

JOSEPH GARNEAU, JR., COMMISSIONER GENERAL, V.  
EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

· FILED MARCH 21, 1894. No. 6741. ·

1. **Claims Against State: DISALLOWANCE BY AUDITOR: APPEAL TO DISTRICT COURT: TRIAL.** On appeal to the district court from the disallowance of a claim by the state auditor, such claim must be presented and acted upon, upon the same proofs as were submitted in support thereof when the action of the auditor was had thereon.
2. **Res Adjudicata.** When, by reason of the insufficiency of the statement or claim originally presented to the auditor, the action of the auditor was justifiable in disallowing the claim presented, and the same has been affirmed in the district court, the rights of the claimant are not thereby adjudicated to such an extent as that he is precluded from afterwards presenting for allowance to the auditor aforesaid his claim properly to entitle him to an allowance of the same.

ERROR from the district court of Lancaster county.  
Tried below before STRODE, J.

*Frank T. Ransom*, for plaintiff in error.

*George H. Hastings*, Attorney General, contra.

RYAN, C.

There were originally presented to the auditor of public accounts of this state a large number of claims, which he disallowed upon different grounds; mainly, however, because there were no vouchers accompanying the claims, and because each was not approved by the commissioner general of this state at the Columbian Exposition. It appears from very many of these claims that they have been presented apparently by individuals, and paid. Probably these payments were made by the commissioner general, though there was no evidence that such was the fact when

they were presented to the auditor for allowance. The auditor disallowed all the claims presented, and from this disallowance an appeal was taken by the commissioner general to the district court of Lancaster county. There was a trial had in the district court which resulted in the affirmance of the action of the state auditor. From the action of the district court, aforesaid, error proceedings have been prosecuted to this court.

On the trial in the district court there was evidence given as to the origin, history, and merits of each of the claims which had been disallowed by the auditor. In the case of *State v. Moore*, found in 37 Neb., 507, it was held that the original vouchers must in all cases be sent to the auditor, and that the commissioner should approve the same before sending them. It was stated in that connection that "the auditor will then have the evidence of the debt before him, and know whether it is such a claim as the legislature has provided an appropriation for. If it is, it is his duty to draw a warrant. If it is not, then he should refuse. He is not to draw a warrant upon mere estimates," etc. The district court had before it the question simply whether or not the auditor properly disallowed the claims as presented to him. It was not proper, after an appeal to the district court from a disallowance of the claims, to supply statements which should have accompanied the presentation of the claims in the first instance to the auditor, and in consideration of which he might have reached a different conclusion from that which he did attain. The district court, therefore, properly sustained the action of the auditor in respect to those claims. It is but proper, however, to say in this connection that by this it is not held that such rights as Mr. Garneau may be able to show upon proper statements as to the claims presented to, and disallowed by, the auditor are by this judgment to be deemed finally adjudicated. On the contrary, if Mr. Garneau can hereafter by proper averments make relevant

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proofs in reference to any of the claims involved in his appeal to the district court, which we have now under consideration, he has the right to do so, with the same effect as he might have presented them in the first instance. The judgment of the district court is

AFFIRMED.

Post, J., not sitting.

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W. J. CONNELL, APPELLEE, V. ELIZABETH GALLIGHER,  
APPELLANT.

FILED MARCH 21, 1894. No. 4780.

1. **Deeds: FAILURE TO ACKNOWLEDGE AND RECORD: TITLE: SHERIFFS' DEEDS.** The grantee in a deed of real estate acquires the legal title thereto on the execution and delivery to him of such deed, though said deed be neither acknowledged nor recorded and be afterwards lost; and a sheriff's deed, made in pursuance of a levy upon, and sale of, such real estate to satisfy a judgment against such grantee, will pass the legal title of such real estate to the grantee in such sheriff's deed.
2. **Quieting Title: ADMISSIBILITY OF DECREE IN EVIDENCE.** G. S. executed and delivered a warranty deed to G. J. for certain real estate. The deed was neither acknowledged nor recorded and was afterwards lost. The real estate was then levied upon and sold by a judgment creditor of G. J., and the purchaser thereof, in a suit in equity against the heirs of G. S., obtained a decree establishing the fact of the execution, delivery, and loss of the deed of conveyance made by their ancestors. After the sale of said real estate on execution, G. J. conveyed the premises to the defendant. In a suit to quiet the title brought by the purchaser at the said sheriff's sale against the defendant, *held*, that the decree in equity, establishing the execution, delivery, and loss of the deed made by G. S. to G. J., was competent evidence.

REHEARING of case reported in 36 Neb., 749.

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47	407

*Gregory, Day & Day and George M. O'Brien*, for appellant:

Judgments and decrees cannot bind strangers to the record, but only parties and privies. (*Sock v. Suba*, 31 Neb., 228; *O'Brien v. Gaslin*, 24 Neb., 559; *State v. Sioux City & P. R. Co.*, 7 Neb., 357.)

No judgment or decree is admissible in proof of title when the parties against whom it is offered were in possession at the time of the commencement of such suit. (*Graves v. Ewart*, 11 S. W. Rep. [Mo.], 971; *Weed Sewing Machine Co. v. Baker*, 40 Fed. Rep., 56; *Orthwein v. Thomas*, 21 N. E. Rep. [Ill.], 430.)

*Connell & Ives, contra:*

The appellee contends that the decree and the deed are admissible as necessary links in his chain of title, and are of the same effect as a voluntary deed from the Graeter heirs. (1 Greenleaf, Evidence, secs. 538, 539; Freeman, Judgments, sec. 416; Van Fleet, Collateral Attack, sec. 12; *Barr v. Gratz*, 4 Wheat. [U. S.], 213; *Buckingham v. Hanna*, 2 O. St., 551; *Baylor's Lessee v. Dejarnette*, 13 Gratt. [Va.], 152; *Den v. Hamilton*, 12 N. J. Law, 109; *Key v. Dent*, 14 Md., 86; *Barney v. Patterson's Lessee*, 6 Har. & J. [Md.], 182; *Seorist v. Green*, 3 Wall. [U. S.] 751; *Freydendall v. Baldwin*, 103 Ill., 325; *Lathrop v. American Emigrant Co.*, 41 Ia., 349.)

RAGAN, C.

This is a suit in ejectment brought in the district court of Douglas county by Connell against Galligher, who set up an equitable defense in that court to Connell's action, and on her motion the case was transferred to the equity docket. The district court rendered a decree in favor of Connell, quieting and confirming in him the title to the

property in controversy, and Mrs. Galligher brought the case here on appeal. This court rendered a decree affirming that of the district court. The opinion will be found in *Connell v. Galligher*, 36 Neb., 749. Mrs. Galligher then filed a motion for a rehearing of the case, suggesting that we had overlooked and misapplied the law; and on this suggestion a rehearing was accordingly granted her. We have again read all the testimony and examined all the arguments and authorities made and cited by the counsel on both sides of the case, and are constrained to say that we are entirely satisfied with the reasoning and conclusion reached by us in the case on the first hearing.

1. The learned counsel for appellant, if we correctly understand their position, insist that our error in the former opinion of the case consists in a misunderstanding and a misapplication of the law as to two points. Graeter, Sr., at one time owned the premises in controversy. He conveyed these premises by an absolute deed to one Graeter, Jr. This deed was defectively executed, never recorded, and was lost. After the conveyance had been made to Graeter, Jr., a judgment was recovered against him, execution issued thereon, and the sheriff levied upon and sold the premises as the property of Graeter, Jr. Connell claims under the sheriff's deed made in pursuance of that sale. It seems to be the contention of the counsel who represent appellant that this deed, either because it was so defectively acknowledged as not to be entitled to record, and was not, therefore, recorded, or because the deed was not recorded and was lost, that Graeter, Jr., took only an equitable estate in the premises in controversy, and that, therefore, the legal title did not pass to Connell's grantor by virtue of the levy upon and sale of the premises by the sheriff. We do not understand that the deed is the legal title, but simply the evidence of the legal title. We do not understand that Graeter, Jr., lost his title to this real estate simply because he lost his deed. As we have al-

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ready said in the reported opinion in this case, we think that by the conveyance of Graeter, Sr., to Graeter, Jr., the latter acquires the legal title to the premises even though the deed was never acknowledged nor recorded and was lost. But there is another thing to be said of this point. Appellant herself claims title to these premises through Graeter, Jr. Now, if he had sufficient title to the premises, notwithstanding his deed therefor was lost and never recorded, to convey to the appellant the legal title of the premises, it seems to us an absurdity to say that he did not have such a legal title as could be levied upon and sold on execution.

2. The second contention of appellant's counsel is that the district court erred in permitting Connell to introduce in evidence on the trial of this case in the district court a certain decree in a case brought by him as complainant against the heirs of Graeter, Sr., as defendants. It appears that Connell, before this suit was tried, brought a suit in equity in the district court of Douglas county against the heirs of Graeter, Sr. In that suit Connell alleged that the parties made defendants were the heirs of Graeter, Sr.; that he, in his lifetime, had sold and conveyed the premises in controversy to one Graeter, Jr., and that such deed had been lost and never recorded; that he, Connell, had become possessed of Graeter, Jr.'s, title and interest in the premises conveyed by said lost deed, and he prayed that the heirs made defendants might be by the court decreed to execute to him a proper deed of conveyance to take the place of the lost deed. On the trial of this cause the district court found and decreed that the allegations in Connell's petition were true, and that he was entitled to a deed of conveyance of the premises from the heirs of Graeter, Sr. On the trial of the case at bar in the district court Connell offered in evidence, as a link in his chain of title, this decree rendered in the case brought against the heirs of Graeter, Sr. Counsel for the appellant now insist that

this ruling of the district court in permitting this decree to go in evidence was error. Counsel say that their client was neither a party, nor privy to a party, to that suit, and that therefore the decree does not bind her. They further say that this suit by Connell was in effect an action to quiet his title to the premises, and that the appellant was a proper and necessary party to such action. The end and the object of the suit brought by Connell against the heirs of Graeter, Sr., was not an action to quiet the title of the premises in Connell as against any one but the heirs of Graeter, Sr. The object of that action was to establish by decree of court that Graeter, Sr., in his lifetime, had sold and conveyed to Graeter, Jr., the premises in controversy. To this action appellant was not a necessary party. She does not claim title to these premises either from Graeter, Sr., or his heirs. Again, the only effect of this decree, as evidence in the case at bar, was to make Connell's chain of title to the premises complete as against the heirs of Graeter, Sr. It did not estop or attempt to estop appellant. But we are unable to understand why the appellant should object to the introduction in evidence of this decree. This decree established the fact that Graeter, Sr., did convey the property in controversy to Graeter, Jr.; that is to say, it established that the conveyance from Graeter, Sr., to Graeter, Jr., alleged to be lost, was in fact made and had been lost. The appellant herself claims title from Graeter, Jr., and her claim of title is based on this lost conveyance. In no view of the case was the appellant prejudiced by the ruling of the trial court in permitting the decree in the case of Connell against the heirs of Graeter, Sr., to be read in evidence.

It would subserve no useful purpose to continue the discussion of this case further. We have already devoted to it more time and attention than we should, considering the large number of cases in this court that have had no consideration whatever. We are all of the opinion that the

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judgment of the district court was right and its judgment must stand affirmed, and it is so ordered.

AFFIRMED.

POST, J., and IRVINE, C., not sitting.

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GEORGE W. WOOLSEY, ADMINISTRATOR, V. CHICAGO,  
BURLINGTON & QUINCY RAILROAD COMPANY.

FILED MARCH 21, 1894. No. 4882.

1. **CARRIERS: PASSENGERS.** A person riding on the locomotive engine of a freight train by agreement with the fireman of such engine to shovel coal for the privilege of riding, such person being on such train without the knowledge or consent of the conductor in charge thereof, is not a passenger of the carrier operating such train.
2. ———: ———. To constitute one a passenger of the carrier on whose train such person is, it is essential that such person should be rightfully on such train or should be thereon with the knowledge or consent of the carrier, or its agent in charge of such train.
3. ———: ———: **TRESPASSER ON ENGINE: NEGLIGENCE.** In a suit by an administrator against a common carrier for damages for negligently causing the death of his intestate, it appeared that the deceased was a man eighteen years of age; that he rode on a locomotive engine by permission of the fireman thereof, agreeing with him to handle coal in consideration of being permitted to ride; that the conductor in charge of the train did not know of the deceased's presence on the engine; that the fireman told the deceased to get off the engine before the train reached McCook, for should he be found on the engine at that place he would be arrested; that no one attempted or threatened to put deceased off the engine; that the fireman did not tell the deceased to get off at the time and place he did; that there was no impending danger from a wreck, collision, or otherwise, which caused deceased to jump from the engine. The administrator pleaded, "when said engine was running at a rate of speed which made it dangerous to life to attempt to alight

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therefrom," the deceased jumped from the engine and was killed, and was induced to make such jump by the fear of arrest should he be found thereon when the engine stopped. *Held*, (1) That the deceased was not a passenger of the carrier on whose engine he was riding; (2) that reasonable men can draw but one conclusion as to the character of the act of the deceased in leaping from the engine at the time and under the circumstances that he did, and that conclusion is that the act of the deceased was criminal negligence, and the proximate cause of his death; (3) that there was no evidence of negligence on the part of the carrier or its servants which the trial court would have been justified in submitting to the consideration of the jury; (4) that the trial court did not err in instructing the jury to return a verdict in favor of the carrier.

ERROR from the district court of Nuckolls county. Tried below before MORRIS, J.

The facts are stated by the commissioner.

*Daniel F. Osgood*, for plaintiff in error, contending that the defendant is liable for damages, cited: *Hussey v. Norfolk S. R. Co.*, 98 N. Car., 41; *Benton v. Chicago, R. I. & P. R. Co.*, 8 N. W. Rep. [Ia.], 330.

*T. M. Marquett* and *J. W. Deweese*, *contra*, cited: *Virginia M. R. Co. v. Roach*, 34 Am. & Eng. R. Cases [Va.], 271; *Robertson v. New York & E. R. Co.*, 22 Barb. [N. Y.], 91; *Chicago & A. R. Co. v. Michie*, 83 Ill., 428; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo., 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St., 213; *Illinois C. R. Co. v. Meacham*, 19 S. W. Rep. [Tenn.], 232; *Osborne v. Kline*, 18 Neb., 351; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 192; *Atchison & N. R. Co. v. Loree*, 4 Neb., 450; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 81.

RAGAN, C.

1. George W. Woolsey, administrator, sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called

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the "railroad company") in the district court of Nuckolls county for damages for negligently causing the death of his intestate, Harry Y. Woolsey. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict for the railroad company. The court refused to set this aside and overruled a motion for a new trial, and the administrator brings the case here for review.

The evidence in the record shows, or tends to show, that the deceased at the time of his death was eighteen years of age, and on the day that he was killed he and a man named Guidici, his companion, by an agreement with the fireman of an engine pulling a freight train of the railroad company, that they, the deceased and Guidici, would break and shovel coal, got upon the engine of said freight train to ride; that such persons' presence on the train was without the knowledge or consent of the conductor in charge of the train; that they paid no fare, nor agreed to pay any, further than to assist the fireman in handling coal; that they were not in the employ of the railroad company, nor in any manner whatever connected with it or the train on which they rode; that as the train was approaching the city of McCook and running at a high rate of speed the fireman told the deceased to get off the train before it stopped at McCook, as, if he should be found on the train there, he would be arrested; no employe of the company put, attempted, or threatened to put the deceased off the train; there was no impending or threatening danger from a wreck or collision or otherwise at any time; that the deceased, while the train was moving at a high and dangerous rate of speed, said to his companion that he was about to jump off; that Guidici put his hand on his shoulder and advised him not to jump, but the deceased voluntarily jumped from the train and was killed. It is now said by counsel for the administrator that the deceased was a passenger on this train. We do not think that he

was a passenger within the meaning of any statute, rule or law, or decision with which we are acquainted. The deceased was fraudulently on this train. He did not go upon this train having a ticket or free pass, nor with the intention of paying his fare. His agreement with the fireman to shovel coal in consideration of a ride was a fraud on the company. It was the duty of the fireman to handle the coal himself. He could not put the corporation which he served under obligations to the deceased as a passenger by allowing him to ride upon the engine in consideration of his shoveling coal, nor for any other consideration, certainly without the presence of the deceased on the engine being known to the conductor in charge of the train. One may become a passenger of a common carrier without ever being actually on the train of the common carrier. It is not easy to lay down a rule defining what in all cases constitutes one a passenger of the carrier on whose train such person is, but it is essential to constitute one a passenger riding on a train of the carrier operating such train, that such person should be rightfully on such train, or should be thereon with the knowledge or consent of the carrier, or his agent in charge of said train. (*Union P. R. Co. v. Nichols*, 8 Kan., 505; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill., 245; *Chicago & A. R. Co. v. Michie*, 83 Ill., 427.)

2. If we should hold as a matter of law that the deceased at the time he met his death was a passenger on the train of the railroad company, the judgment here sought to be reversed would still have to be affirmed. By section 3, article 1, chapter 72, Compiled Statutes, 1893, railroad companies are made insurers of the safety of a passenger, except in cases where the injury of such passenger arises from his criminal negligence. The administrator pleaded in his petition, and the evidence supports the plea, that the decedent jumped from the train, "when said engine and cars were running at a rate of speed which [made it] dangerous to life to attempt to alight there[from]." All rea-

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sonable men can draw but one conclusion as to the character of the act of the deceased in leaping from this train at the time and under the circumstances that he did, and that conclusion is that in so doing the deceased was guilty of criminal negligence. It has been many times said in this court, and so often ruled as to be no longer an open question, that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question is one of law for the court." (*Omaha Street R. Co. v. Craig*, 39 Neb., 601, and the cases there cited.) The only act of negligence charged against the railroad company is that the fireman told the deceased to get off the train before it reached McCook, as, if he should be found upon the train there, he would be arrested; but it is neither pleaded nor proved that the fireman told the deceased to jump off the train at the time he did jump. He told him to get off the train before it reached McCook. The deceased was not an infant of tender years, insane or idiotic, and, as before stated, he did not leap from this train in pursuance of any threat made to push him off if he did not jump, nor under the stress of a fear implanted in his mind by reason of an impending danger, wreck, or collision. There is no evidence in the record which shows that any employe of the train knew that the deceased was about to jump from the train at the time that he did. His companion, Guidici, who was a witness for the administrator, remained upon the train and advised the deceased that it was dangerous for him to leap therefrom, and advised him not to do so. There is in all this record not one word of evidence of any negligent act or omission of duty on the part of this railroad company that conduced to the death of the deceased. We must not be understood as deciding that because the deceased was not a passenger upon the train of the railroad

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company, that because he was wrongfully and fraudulently on its train and a trespasser thereon, that therefore the railroad company would not be liable for negligence in injuring or killing him. What we do decide is that the deceased, at the time he was killed, was not a passenger upon the train of the railroad company; and that the district court properly held that the uncontradicted evidence shows that he met his death, not from any negligence of the railroad company or any of its agents or servants, but from his own criminal negligence. The law does not require of district courts to do useless things, and in this case, had the jury returned a verdict in favor of the administrator, it would have been the duty of the district court to have set such verdict aside; and in such a case the court was entirely right in directing the jury to find a verdict for the railroad company. The judgment of the district court is

AFFIRMED.

Post, J., not sitting.

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**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY  
v. MINNIE LANDAUER.**

FILED MARCH 21, 1894. No. 4885.

1. **Carriers: NEGLIGENCE.** By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the gross negligence of such passenger, or his violation of some rule of the carrier brought to such passenger's notice.
2. **Common carriers of passengers** should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the traveling public.

39	803
44	860
39	803
48	99
48	640

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**3. Carriers: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE**

When the proof shows that one was a passenger of a common carrier, and, while such passenger, was injured, the law raises the presumption of the carrier's liability from the fact of the injury; but this presumption is not a conclusive one; it is such a presumption as in the absence of all evidence as to the cause of the passenger's injury, would render the carrier liable; and in such case, when the carrier shows that the passenger was injured by stepping from its running train, the presumption of liability raised by law against the carrier is overthrown, and it then devolves upon the passenger to show some justifiable reason for such action to relieve himself from the imputation of gross negligence; and the supposition or belief of the passenger that the train was standing still when he took the step which injured him, is not competent evidence from which the jury may find that the passenger was not negligent, unless accompanied by evidence tending to show circumstances rendering this supposition reasonable, or at least excusable, as, in the absence of such evidence, no reasonable mind could honestly say that the passenger was not guilty of gross negligence, and a verdict for such passenger would be without evidence to sustain it.

4. The former opinion in this case, reported in 36 Neb., 642, adhered to.

REHEARING of case reported in 36 Neb., 642.

*T. M. Marquett and J. W. Deweese*, for plaintiff in error.

*Leese & Stewart*, contra.

RAGAN, C.

Minnie Landauer sued the Chicago, Burlington & Quincy Railroad Company for damages for an injury which she alleges she sustained through that company's negligence while a passenger on one of its trains. She had a verdict and judgment in the district court, and the railway company prosecuted a petition in error to this court, where the judgment of the district court was reversed and the cause remanded for a new trial. Miss Landauer's counsel then filed a motion for a rehearing, suggesting, in effect, that the judgment of reversal was erroneous because the

finding of the jury on which it was based had for its support competent evidence. On this suggestion, a rehearing was accordingly granted, and the cause has again been fully examined. The reported opinion of the case is *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642.

By the statutes of the state, carriers of passengers are made insurers of their passenger's safety, and liable for all injuries sustained by such passengers, unless it be shown that the injuries were caused by the gross negligence of the person injured, or his violation of some rule of the carrier brought to such passenger's notice. On the trial of the case at bar the undisputed evidence showed that the railway company was a common carrier; that Miss Landauer was a passenger on one of its trains, and, while such passenger, was injured. In the absence of all further proof this would have entitled the passenger to damages, as the law presumes the carrier's liability from the fact of the passenger's injury; but this presumption is not a conclusive one; it is such a presumption as, in the absence of all evidence as to the cause of the injury, would render the carrier liable. After Miss Landauer had proved that the railroad company was a common carrier, that she was a passenger on its train, and that she was injured, the burden then fell to the carrier to show that her injury was the result of her gross negligence. The question then is, does the record show that the carrier made such proof? The undisputed evidence in the record is that the train on which Miss Landauer was a passenger stopped at the station where she was to alight; that after it had again started on its way she went out of the coach upon the platform in front thereof, stepped down on one of the steps of the car, and after the coach had passed the station platform, deliberately "stepped out into the air," and was injured. When the carrier made this proof, the presumption of liability raised against it by the law was overthrown, and it then devolved upon the passenger to show some reason for this conduct on her part

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which justified her action and relieved her from the imputation of gross negligence. The only reason found in the record for this conduct on the part of Miss Landauer is her statement that at the time she "stepped into the air," she supposed the train was standing still; but such supposition on her part was not a competent fact to go to the jury, from which they might say that by reason thereof her act was not negligence, unless accompanied by evidence tending to show circumstances rendering this supposition reasonable, or at least excusable. There is no word of evidence in the record of any such explanation or attempted explanation of this conduct on her part; and it is not pretended but that her act of "stepping into the air," at the time and place that she says she did, produced the injury for which she now claims damage; and there is no evidence in the record that Miss Landauer was caused or induced to step from this moving train "into the air" by any act or omission of the carrier or any of its servants. Her counsel, indeed, argue the case on the theory that the train did not stop at the station a sufficient length of time to enable their client to alight with safety. The fallacy of this argument lies in the fact that there is no evidence in the record which tends to show that the passenger was injured by reason of any such cause, nor that, by reason of the short length of time which the train stopped, she took the step which injured her.

Counsel cite us to *Missouri P. R. Co. v. Baier*, 37 Neb., 235, and *Union P. R. Co. v. Porter*, 38 Neb., 226, but these cases have no application here. In the Missouri Pacific case a passenger was injured, and the attempt to show that her injury occurred by reason of her negligence was a complete failure. In the Union Pacific case, the passenger occupied a rear coach of the train. The train stopped at the station where the passenger was to alight, but the coach on which he was riding was not stopped opposite the station platform. The passenger went out on the platform of

the car, supposing that the engine was taking water, and that the train would be pulled up and the coach on which he was riding stopped at the station platform so that he could alight. After the train had been put in motion, the passenger discovered that it was not going to stop, and thinking that he could step to the platform with safety, he did so, and was injured. The railway company argued • that this stepping from the moving train to the platform at the time and place was gross negligence on the part of the passenger, but this court said that it was the duty of the railway company to stop its train so that the coach on which the passenger was riding would stop opposite the station platform, or, in default of that, the railway company was under obligation to notify the passenger that the train would not stop and afford him an opportunity to pass through the coaches in front of the one on which he was riding, and then to step to the platform. The railway company having done neither of these things, this court said that the jury might say whether, under the circumstances of the case, the passenger was guilty of negligence in stepping from the platform of the moving train at the time and place and under the circumstances which he did. We are entirely satisfied with the reasoning in both cases, and with the rule there laid down, and reaffirm these cases.

In the case at bar, if Miss Landauer had started from her seat in the coach after the train had stopped, and then it had started while she was in the act of stepping, or attempting to step, to the platform, such explanation of her conduct would have been evidence to go to the jury in justification of her conduct. If the train had been so crowded with passengers that Miss Landauer had not time to go from her seat in the coach to the steps of the car and step to the platform before the train started, that would have been evidence from which the jury might have excused her act. But Miss Landauer's supposition that the train was standing still when she took the step that she did, was not

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competent evidence to authorize the jury to find she was not negligent, unless coupled with evidence tending to show that the carrier, its agents or servants, by some act or omission of theirs, induced in her mind such false supposition, or other evidence rendering such supposition reasonable. Suppose that when this train was on the prairie, running at the rate of forty miles an hour, that Miss Landauer had deliberately walked out to the steps of the coach and "stepped into the air" and been injured, and sued the carrier for damages. When she proved the facts that the railroad company was a common carrier; that she was a passenger on its train, and her injury, the presumption of the carrier's liability for the injury would then arise. The carrier then, by proving that she had gone out to the steps and "stepped into the air" at the time and place supposed, would have relieved itself of the presumption of liability cast on it by the law. Can it be said in the case supposed that Miss Landauer could relieve herself of this imputation of negligence by showing that at the time she took the supposed step that she believed, or that she supposed, that the train was standing still? Yet there is no difference in principle between the case supposed and that at bar. Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable, and this is the rule both at common law and under the statutes. It is a rule founded on principles of public policy and enforced by the courts for the protection of the traveling public; but when a passenger on a moving railway train deliberately steps from such train "into the air" and is injured, then such passenger, to relieve himself from the imputation of negligence, must offer some competent evidence in explanation of his conduct from which a jury may say that his conduct, under the circumstances, was not gross negligence or the carrier will not be held liable; and in the absence of such evidence, no reasonable mind could honestly

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say that the passenger was not guilty of gross negligence, and a verdict for him would be without evidence to sustain it. The judgment of the district court must stand

REVERSED.

Post, J., not sitting.

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MIKE WARD V. SPELTS & KLOSTERMAN.

FILED MARCH 21, 1894. No. 5306.

1. **A contract for the sale and delivery of corn at a time, place, and price therein mentioned is not wanting in mutuality because it is signed by only the vendor. By the acceptance of such contract by the vendee therein he becomes bound to accept and pay for the corn on its delivery as therein provided, as much so as if he signed the agreement, and it provided in express terms that he would accept and pay for the corn on its delivery.**
2. **Breach of Contract: ACTION FOR DAMAGES: ESTOPPEL: INSTRUCTIONS.** In a suit for damages for failure of the defendant to deliver 3,000 bushels of corn to the plaintiff as per the terms of a written contract, the defendant pleaded, and his evidence tended to show, that he contracted with the plaintiff's agent to deliver the plaintiff sufficient corn, at twenty-three and one-half cents per bushel, to amount to \$52.50; that he, the defendant, could neither read nor write; that plaintiff's agent reduced the contract to writing, and fraudulently inserted in said contract 3,000 bushels; and that defendant, supposing the writing embodied the contract actually made with the agent, signed it by making his mark. In such suit between the original parties to said contract the court instructed the jury as follows: "The defendant having admitted signing the contract under which the plaintiff claims, before he can avoid said written contract on the ground of fraud practiced upon him because he could not read it, he must satisfy you that he was not negligent or careless in affixing his signature by mark to said writing;

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and that if he made his mark thereto without asking to have the contents read to him or to be told what the contents of the writing were, but so affixed his signature thereto on request of plaintiff's agent without anything further being said or done to induce him to sign it, then in that case he should be held to have duly made said contract and should be bound by the terms thereof." *Held*, (1) That the defendant's negligence or carelessness in affixing his signature or mark to the contract did not estop him from denying his liability thereon; (2) that if the written contract which he signed embraced the contract which he made, he was liable upon it, and if it did not embrace the contract which he made, he was not liable thereon; (3) that the instruction was erroneous.

3. **Contracts: FAILURE TO SIGN: ESTOPPEL.** The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made.

ERROR from the district court of Seward county. Tried below before BATES, J.

*Norval Bros. & Lowley*, for plaintiff in error, contending that the contract lacks mutuality, cited: *Bishop, Contracts*, secs. 77, 78, 153; *Mason v. Decker*, 72 N. Y., 595.

*Steele Bros.*, *contra*, in support of the contract, cited: *Homan v. Steele*, 18 Neb., 652; *Biglow, Estoppel*, p. 684, and cases cited; *Justice v. Lang*, 42 N. Y., 493; *Weightman v. Caldwell*, 4 Wheat. [U. S.], 84; *Ives v. Hazard*, 4 R. I., 27.

RAGAN, C.

Spelts & Klosterman sued Mike Ward in the district of Seward county for damages for his failure to deliver to them three thousand bushels of corn, in pursuance of a contract in words and figures as follows:

"In consideration of \$50 this day to me in hand paid by Spelts & Klosterman, and interest thereon at ten per

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cent per annum until fulfillment of this contract, I hereby sell and convey unto the said Spelts & Klosterman 3,000 bushels of good, sound, dry, shelled corn at 23½ cents a bushel, the same being now on a certain quarter section of land, and agree to deliver the same in good order at Ulysses, Nebraska, at buyer's option, in the months of July and August, A. D. 1890. Dated this 31st day of June, 1890.

his  
"MIKE × WARD."  
mark.

Spelts & Klosterman pleaded that they had on the date of the execution of said writing paid Ward the \$50; that Ward had delivered them only 250 bushels of corn; that they had demanded of Ward a delivery of the corn pursuant to said contract; that he had failed and refused to deliver; and that the corn, at the time and place it should have been delivered, was worth forty cents a bushel, and by reason of Ward's failure to comply with the agreement they had been damaged. Ward's defense, so far as material here, was that on the 1st day of July, 1890, he received from Spelts & Klosterman \$52.50 in money, and at that time he agreed to sell and deliver to them, at twenty-three and one-half cents per bushel, sufficient corn to repay said money, and that he further agreed that if he had any other grain to spare he would sell the same to Spelts & Klosterman at the same price; that the agent of Spelts & Klosterman made a memorandum in writing, which he, Ward, supposed embraced the contract between him and Spelts & Klosterman and was his receipt for the money he had received of them; that said agent presented the memorandum to him, Ward, and informed him that it embraced the agreement to deliver sufficient grain to pay the \$52.50 and any other grain that Ward might be able to spare; that he, Ward, could neither read nor write, and was induced to and did sign said memorandum believing the contract embraced the agreement actually made between him and Spelts & Klosterman. The case was tried to a jury

and a verdict returned against Ward; and he brings the judgment rendered on such verdict here for review.

1. The first assignment of error relates to the memorandum or contract sued on and quoted above. The objection urged to this memorandum or agreement is that by it Spelts & Klosterman were not bound to do anything and that therefore, as a contract, it lacks mutuality. The agreement recites that in consideration of \$50 received from Spelts & Klosterman, Ward had sold them 3,000 bushels of corn, which he agreed to deliver at a future date. Spelts & Klosterman having accepted this agreement, became bound to accept and pay for the corn on its delivery as therein provided, as much so as if the agreement had, in express terms, provided that they would accept and pay for the corn at the time and place and at the price named. The agreement was not wanting in mutuality. By the contract Ward agreed to deliver the corn to the persons with whom he made this agreement, and because of their acceptance of the agreement the law raised a promise on their part to accept and pay for the corn when delivered according to the contract. (*Justice v. Lang*, 42 N. Y., 493; *Weightman v. Caldwell*, 4 Wheat. [U. S.], 84.)

2. The second error alleged is the giving by the court to the jury of an instruction as follows: "The defendant having admitted signing the contract under which the plaintiff claims, before he can avoid said written contract on the ground of fraud practiced upon him, because he could not read it, he must satisfy you that he was not negligent or careless in affixing his signature by mark to said writing, and that if he made his mark thereto without asking to have the contents read to him or to be told what the contents of the writing were, but so affixed his signature thereto on request of plaintiff's agent without anything further being said or done to induce him to sign it, then in that case he should be held to have duly made said contract and should be bound by the terms thereof." The princi-

pal question litigated in the case was whether the contract sued on was the contract made between Ward and Spelts & Klosterman through their agent. The testimony offered by Ward tended to prove that he could neither read nor write; that he contracted with Spelts & Klosterman to deliver them, not 3,000 bushels of corn, but a sufficient quantity to amount to \$52.50 at twenty-three and one-half cents per bushel, and more corn at the same price if he ascertained he could spare it. It was not disputed that the agent of Spelts & Klosterman wrote the contract sued on, and that Ward signed it by making his mark. The instruction complained of told the jury, in effect, that if the agent of Spelts & Klosterman practiced a fraud on Ward by putting into writing a different contract from the one actually made, then, if Ward signed such contract at the request of the agent, without asking to have the contract read to him, that he was bound by it. This instruction was erroneous. The suit on this contract is between the original parties thereto, and Ward is liable for damages for his failure to perform the contract he made, not for his failure to perform the contract he did not make; but, by the instruction given, the jury are told that if he neglected to have this contract read over to him he is bound by it, simply because he signed it. Suppose that Ward had contracted to sell Spelts & Klosterman 3,000 bushels of grain at twenty-three and one-half cents per bushel, and that the agent had drawn up the contract and made it read 3,000 bushels of corn at three cents per bushel, and that Ward had been able to read and write and had signed the contract, supposing that the agent had drawn it correctly. Can it be true that because Ward was careless or negligent in not reading the contract for himself that the party who thus perpetrated a fraud upon him could take advantage of that fraud? Ward's negligence or carelessness in affixing his signature or mark to this contract has nothing whatever to do with his liability on it. If the written contract

which he signed embraced the contract which he made, he is liable upon it. If it does not embrace the contract he made, he is not liable. (*State Ins. Co. v. Jordan*, 29 Neb., 514.) But it is said that this instruction was copied from an instruction found in *Cole Brothers v. Williams*, 12 Neb., 440, and that the instruction copied from has been approved by this court. In that case one Williams sued Cole Brothers & Hart for a bill of goods. Cole Brothers & Hart filed a set-off for \$404 for putting lightning rods on the house of Williams in pursuance of a written order attached to their answer. To this answer Williams replied that he made a contract with the agent of Cole Brothers & Hart, by which they agreed to put lightning rods on his property at a cost of \$100, and thereafter this agent presented a writing to him to sign, informing him that it contained directions to the agent's principal as to the manner of putting up the lightning rods; that he did not see very well; that his glasses were not at hand, and that he did not read the memorandum or order, but signed it, relying upon its embodying the contract as made between him and the agent. Williams recovered a judgment in the district court and Cole Brothers & Hart brought the case to this court and assigned that the trial court erred in instructing the jury as follows: "If the plaintiff signed such paper, knowing its contents, or having the means of making himself acquainted with the contents therewith, which he declined or neglected to use, then he is bound by its stipulation." Other instructions were given which were also excepted to by Cole Brothers & Hart. The writer of the opinion does say: "These two instructions, taken together, very fairly express the law applicable to the inquiry before the jury." But the most casual reading of the opinion in that case will show that the conclusion arrived at did not depend upon the correctness or the incorrectness of the instruction quoted. The instruction was erroneous, but it was not prejudicial to Cole Brothers & Hart. The error in the in-

struction was only prejudicial to Williams. The doctrine, that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made. In the case at bar counsel for defendants in error insist that even if the instruction complained of was erroneous, still the case should not be reversed, because they say that under the evidence the jury could have reached no other conclusion than that the contract is and was the contract made between Ward and Spelts & Klosterman. In other words, counsel contend that had the jury found a verdict in Ward's favor, the trial court would have been compelled to set it aside as unsupported by the evidence. We do not desire to express any opinion on the weight of the evidence or the credibility of the witnesses or any of them; but the trouble with the contention of counsel is that by the instruction complained of the jury, if it obeyed such instruction, was compelled to find a verdict against Ward. The judgment of the district court must be reversed and the cause remanded for a new trial, and it is so ordered.

REVERSED AND REMANDED.

Post, J., not sitting.

PRENTICE BROWNSTONE COMPANY, APPELLANT, V. ORLANDO J. KING ET AL., APPELLEES,

AND

PRENTICE BROWNSTONE COMPANY, PLAINTIFF IN ERROR, V. ORLANDO J. KING ET AL., DEFENDANTS IN ERROR.

FILED MARCH 21, 1894. Nos. 5496, 6000.

1. **Review: PROCEEDINGS IN ERROR.** The judgment of a district court, pronounced in an ordinary action at law, can only be reviewed in this court on a petition in error.
2. **Appeal: REVIEW.** An appeal from an order dismissing a suit in the nature of an equitable garnishment, brought to restrain the defendant from paying money to an alleged debtor of the appellant during the pendency of his suit at law against such debtor, will be dismissed without an examination on its merits, when it appears that appellant failed in his suit at law in the court below to establish his claim, and the judgment in such case has been affirmed by this court.

APPEAL AND ERROR from the district court of Cass county. Heard below before CHAPMAN, J.

*Blair & Goss*, for appellant and plaintiff in error.

*A. N. Sullivan* and *H. D. Travis*, contra.

RAGAN, C.

The Prentice Brownstone Company (hereinafter called the "Stone Company") brought a suit at law in the district court of Cass county against Orlando J. King and Erath & Thym, a copartnership. The Stone Company alleged as its cause of action against King that he had the contract for furnishing the material and building a court house for Cass county; that he sublet the contract to furnish the stone, and to do some stone work, to Erath &

Thym, and that they purchased stone of the Stone Company, and, on the 9th of October, 1891, was indebted to it \$1,888; that on said date, by an agreement between all the parties to the suit, King agreed to pay to the Stone Company \$1,500 out of the money owing to him by Cass county and charge the same to the account of Erath & Thym, and that he had refused to make such payment. The defense made by Erath & Thym and the case, so far as they are concerned, are immaterial here. King, by his answer in the suit, expressly denied the agreement to pay the Stone Company \$1,500 or any other sum of money as pleaded by it; but alleged, in effect, that on the 9th day of October, 1891, that he promised the Stone Company that when he should have a settlement with Erath & Thym and when they should complete their contract with him, he would pay over to the Stone Company any balance that might be found owing to Erath & Thym. This case was tried to a jury and a verdict returned in favor of King, and judgment rendered on such verdict. The Stone Company filed in the district court a motion for a new trial on the 29th of September, 1892, and on the 17th of February, 1893, filed in this court a transcript of the record and a bill of exceptions in the case; but no petition in error has ever been filed here, and for that reason we do not know of what errors, if any, the Stone Company complains; and as the time has long since gone by when the Stone Company could file in this court a petition in error, the judgment of the district court must be affirmed.

The Stone Company on the same day that it brought the aforesaid action at law brought also a suit in equity in the district court of Cass county against Orlando J. King and the county officers of Cass county. In this petition the Stone Company alleged the indebtedness of King to it on the same contract and in the same manner as it alleged in its suit at law; and further alleged that the county of Cass was indebted to King in a larger sum than \$1,500; the

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pendency of its suit at law; and that King was insolvent, and prayed for an injunction restraining the county of Cass and its officers from paying King any sum of money whatever, and for a decree of the court compelling the county authorities of Cass county to pay what they owed King into court, to abide its further order. The district court, on a final hearing of this equity suit, dismissed the same and the Stone Company brought that case here on appeal. The two cases have been considered together. The suit in equity was in effect an equitable garnishment to reach money in the hands of Cass county owing by it to King. Since the Stone Company failed in the court below to establish that King was indebted to it, and that judgment has been affirmed, this court will not examine the appeal in equity on its merits; and the appeal in the equity case must therefore be dismissed.

JUDGMENT ACCORDINGLY.

Post, J., not sitting.

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OMAHA SOUTHERN RAILWAY COMPANY V. LEVI G. TODD.

FILED MARCH 21, 1894. No. 5443.

1. **Change of Venue: DISCRETION OF COURT.** When it shall be made to appear to a district court that a fair and impartial trial of a cause cannot be had in the county where brought, then such court has not only the discretion, but it is its duty to send the case to some adjoining county for trial.
2. **Review of Order on Motion for Change of Venue.** The decision of a district court, made on conflicting evidence, that a fair and impartial trial of a case cannot be had in the county where brought because of the bias and prejudice existing in such county against one of the parties to such suit, will not be disturbed by this court, if supported by competent evidence.

39	818
140	388
39	818
42	98
39	818
44	697
39	818
48	90

3. **Eminent Domain: DAMAGES.** The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit or other set-off whatsoever; (2) the depreciation in value of the remainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits.
4. ———: ———: **EVIDENCE.** In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. (*St. Louis & S. E. R. Co. v. Teters*, 68 Ill., 144; *Mills*, Eminent Domain, secs. 162, 163, followed.)
5. ———: ———: ———. Where a number of tracts of land, as described by government surveys, are used together as one farm or body of land, in determining the owner's damage by reason of the location of a railway across one or more of the tracts the injury to the whole farm or body of land should be considered. (*Northeastern N. R. Co. v. Frazier*, 25 Neb., 42; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610, followed.)
6. ———: ———: ———. On the trial of an appeal from an award made by commissioners appointed to assess the damages sustained by a land-owner by reason of the appropriation of a part of his land for railroad purposes, evidence as to what such land-owner paid for the land is incompetent. (*Dietrichs v. Lincoln & Northwestern R. Co.*, 12 Neb., 225.)

ERROR from the district court of Otoe county. Tried below before HALL, J.

The facts are stated in the opinion.

*M. L. Hayward* and *A. N. Sullivan*, for plaintiff in error :

One of the parties to a suit cannot appeal in his own behalf and ignore his associates. (*Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Neb., 790; *Curten v. Atkinson*, 29 Neb., 612.)

The change of venue granted was an abuse of discretion prejudicial to the rights of plaintiff in error. (*Hudson v. Hanson*, 75 Ill., 198; *Moss v. Johnson*, 22 Ill., 640; *Kelly v. Downs*, 29 Ill., 74; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42.)

The court erred in refusing to strike out the answer of the witness in reference to the trouble with the connections to the spring of water. (*State Historical Association v. City of Lincoln*, 14 Neb., 336; *High v. Merchants Bank*, 6 Neb., 155; *Cropsey v. Averill*, 8 Neb., 151; *Dunbier v. Day*, 12 Neb., 596; *Harrison v. Baker*, 15 Neb., 43; *First Nat. Bank v. Carson*, 30 Neb., 108.)

The refusal to permit the land-owner to testify on cross-examination as to what he paid for the land in controversy, or a portion of it, was error. (*Kansas City, W. & N. W. R. Co. v. Fisher*, 30 Pac. Rep. [Kan.], 111.)

The circumstance that the live stock of the land-owner will be liable to injury from operating the road should not be considered. (*Pennsylvania & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. St., 414; *Baltimore P. & C. R. Co. v. Lansing*, 52 Ind., 229; *Baltimore P. & C. R. Co. v. Johnson*, 59 Ind., 188; *Alabama & F. R. Co. v. Burkett*, 46 Ala., 569; *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb., 592.)

It was error to refuse testimony to show that no farm such as that owned by plaintiff was ever sold in Cass county as high as thirty dollars per acre. (*Markell v. Moudy*, 13 Neb., 322.)

*E. H. Wooley and Beeson & Root, contra:*

Damages caused by the location of a railroad are to be considered as affecting the whole farm through which the road passes. (*Kremer v. Chicago & St. P. R. Co.*, 52 N. W.

Rep. [Minn.], 978; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42; *Wilmes v. Minnesota & N. W. R. Co.*, 13 N. W. Rep. [Minn.], 39; *Sheldon v. Minneapolis & St. L. R. Co.*, 13 N. W. Rep. [Minn.], 134; *Ham v. Wisconsin, I. & N. R. Co.*, 17 N. W. Rep. [Ia.], 157.)

The refusal to permit the land-owner to testify on cross-examination as to what he paid for a portion of the land in controversy was proper. (*Dietrichs v. Lincoln & N. R. Co.*, 12 Neb., 225.)

No testimony was introduced for the purpose of recovering damages in advance for stock that might be injured or killed on the road. The liability of stock to be killed would have a tendency to depreciate the value of the land. (*Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421; *Blesch v. Chicago & N. W. R. Co.*, 48 Wis., 168.)

RAGAN, C.

The Omaha Southern Railway Company, by proceedings duly instituted for that purpose in the county court of Cass county, condemned a right of way across the farm of Levi G. Todd. From the award of damages made to him by the commissioners appointed in said condemnation proceedings Todd appealed to the district court of Cass county. On application of Todd that court granted a change of venue in the case and it was tried in the district court of Otoe county, where Todd recovered a judgment against the railway company for a greater sum than that awarded him by the commissioners in the condemnation proceedings. The railway company brings the case here for review, and assigns the following errors:

1. That Mrs. Levi G. Todd, the wife of the defendant in error, did not join with him in the appeal taken by him from the award of the commissioners to the district court. This is not one of the errors assigned in the petition in error filed herein and for that reason will not be further noticed.

2. That the district court of Cass county erred in grant-

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Omaha S. R. Co. v. Todd.

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ing the defendant in error a change of venue. Section 61 of the Code of Civil Procedure provides: "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, \* \* \* the court may, on application of either party, change the place of trial to some adjoining county," etc. Whether Todd, by reason of the bias and prejudice existing against him in Cass county, was unable to have a fair and impartial hearing of this case in Cass county was a question of fact for the determination of the judge who heard the application for a change of venue, and his finding on that question, like any other finding of fact, ought not to be disturbed by this court, if supported by competent evidence. If the statements made in the affidavits filed by Todd to obtain this change of venue were true, then there can be no question but that he was unable, by reason of the bias and prejudice existing against him in Cass county, to obtain a fair and impartial trial of this case therein. We certainly cannot say that the evidence offered for that purpose did not make it appear to the court that a fair and impartial trial of this case could not be had in Cass county. We do not think that the court was in error in granting the application to change the venue of this case, nor do we think that he abused his discretion. When it shall be made to appear to the court in which a case is pending that a fair and impartial trial cannot be had where the suit is pending, then the court has not only the discretion to send the case to some other county for trial, but it is its duty to do so.

3. That the defendant in error was permitted on the trial to testify as to the width of the right of way appropriated by the railway company through his farm. The defendant in error testified in his own behalf and had been describing to the jury the course of the railroad across his land saying, that the road ran straight from the point where it entered the land until it came near a spring on his land.

He was then asked this question: "How wide is the right of way there?" To which the railroad company objected as follows: "Objected to, as the condemnation proceedings will tell that." Overruled and exception taken. The reason assigned for the objection was of no force. Besides the testimony was competent. The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken at the time of the taking, without diminution on account of any benefit, advantage, or other set-off whatsoever; (2) the depreciation in the value of the remainder of the tract of land caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. (*Rockford, R. I. & St. L. R. Co. v. McKinley*, 64 Ill., 339; *Chicago, K. & N. R. R. Co. v. Wiebe*, 25 Neb., 542; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind., 479.) In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed, and danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. (*Omaha Southern R. Co. v. Beeson*, 36 Neb., 61.)

4. Because the defendant in error was permitted on the trial to answer the following question: "Is there any point north of your private crossing on your farm where

stock can cross the railroad?" For the reasons just stated there was no error in permitting this question to be answered. (Mills, Eminent Domain, sec. 162, and cases there cited.)

5. It appears from the evidence that there was a spring of water upon the farm of the defendant in error and he had, by means of pipes and a hydraulic ram, conducted the water from this spring to his feed lots; and that the railway company's right of way interfered with this spring or the flow of water from it to the feed lots of the defendant in error. On the trial the defendant in error testified that prior to the construction of the road there was sufficient water from the spring to run the hydraulic ram; that since the construction of the road the ram would only run about five or six hours, and then stop. He was then asked: "Then what is necessary to start it?" Answer: "If the piston stops up, the water will gradually run off, and when all is out it will pass down. If it happens to stop down, then you have to start it. It is very easily started, but sometimes takes four or five minutes." It is now insisted that the court erred in overruling the motion of the railway company to strike out the answer of the witness to the above question. We think the answer of the witness was not responsive to the question, but we are unable to see how the plaintiff in error was prejudiced by it.

6. The substance of the next error assigned is that on the trial the defendant in error was permitted to testify to the damages resulting to his entire farm through which the railroad was constructed, the contention of the plaintiff in error being that Todd's damages, outside of the value of the land actually taken, should have been confined to the tracts through which the road was constructed. In *Northeastern N. R. Co. v. Frazier*, 25 Neb., 42, it is said: "Where a number of tracts of land as described by the government surveys are used together as one farm or body of land, in determining the owner's damage, by reason of the location

of a railway across one or more of the tracts, the injury to the whole farm or body of land should be considered." We are entirely satisfied with the rule as laid down in that case and adhere to the same. (See, also, *Robbins v. Milwaukee & H. R. Co.*, 6 Wis., 610; Mills, Eminent Domain, sec. 166, and cases there cited.)

7. The next error assigned is the refusal of the court to permit the defendant in error to testify on cross-examination what he paid for a portion of the land across which the road was constructed. It is to be said of this assignment (1) that the defendant in error, on his cross-examination, testified that he paid \$5,500 for the piece of land inquired about, containing two hundred acres; (2) that the question propounded to the defendant in error on cross-examination, viz., "State to the jury what you paid for that quarter," was incompetent, and the court did not err in refusing to permit it to be answered. (*Dietrichs v. Lincoln N. R. Co.*, 12 Neb., 225.)

8. The next error relates to some testimony given by a witness named Foster. He was a carpenter and had testified that he had built some barns on Todd's farm, and had also testified as to the value of the buildings on the farm. He was then asked: "What are they [the buildings] worth to the farm?" Counsel for the railroad company to this question said: "We object to that form of question." Witness answered. The ruling of the court in permitting this question to be answered is the next error assigned. It will be observed that the objection was not made that the question called for incompetent, immaterial, or irrelevant evidence. The objection was simply to the form of the question. The objection was unavailing.

9. The next error assigned is as follows: "The court erred in permitting the witness Stein to testify as to the liability of stock being injured." Stein testified in chief that he was acquainted with the value of Todd's farm; that it was worth \$50 an acre before the location of the

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road across it, and that it was worth \$40 an acre immediately after the location of the road across the farm. He was then turned over for cross-examination to the railway company's attorneys and was asked:

Q. You base the value of that land as a stock farm upon the water privileges?

A. Yes, sir; I do.

Q. You base adversely upon the loss of that privilege?

A. Yes, sir.

On redirect examination he was then asked:

Q. Is there anything else you base it on?

A. Yes, sir.

Q. What is it?

A. Opening gates.

Q. State if there is any danger to stock.

A. I think so.

Q. I will ask you whether the liability of stock getting injured on the road affects the value of the land?

This was objected to as incompetent, the objection being overruled and the railway company took an exception.

The witness was then asked by counsel for the railway company this question:

Q. How much would you say that farm was depreciated by reason of danger to the stock?

A. About ten dollars an acre less.

It will be observed that the question objected to was whether the witness considered the liability of stock being killed by the railroad affected the value of the farm. There was no error in permitting that question to be answered.

In *St. Louis & S. E. R. Co. v. Teeters*, 68 Ill., 144, it is said: "As the design of the law is to fully compensate a party for all injury he may sustain by reason of the appropriation of his land for railroad purposes, and which shall grow out of, or be occasioned by, the location and use of the road, evidence as to the danger of killing stock and

the danger of the escape by fire by reason of the construction of the road is proper to be considered by the jury." The question being tried was whether the farm was depreciated in value by reason of the location of the road across it, and everything which tended to show that the continuing presence and operation of the road across the farm tended to make it more valuable was competent, and everything which tended to show that the continuing presence and operation of the road across the farm depreciated its market value was competent. The object of the question objected to was not to show the value of the stock that might be killed or injured and have the value of such stock added to the damages of the defendant in error in this case, but the object of this evidence and of all such evidence in such cases is to show that the liability of such a thing happening as the killing of stock or the setting of fire tend to depreciate the market value of the real estate crossed by the railway.

10. A witness named Wolf testified on the trial in behalf of the defendant in error and was cross-examined by counsel for the railway company and was asked:

Q. Have you ever known of any improved farm having been sold in Cass county of 540 acres?

A. Yes, sir; I have.

Q. Whose was it?

A. I forget his name; I think he was a Canadian.

Q. Where was it?

A. South of Weeping Water.

Q. Is not it a fact that was bought for less than a quarter section were being sold for on account of the large quantities being bought at once?

This question was objected to, as incompetent and irrelevant and the objection sustained, and the railway company excepted. Counsel for the railway company then made this offer: "Defendant offers to prove by this witness that no farm in the condition of plaintiff's has ever been sold for

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Nostrum v. Halliday.

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as high as \$30 an acre in Cass county." The offer was objected to and the objection sustained. The railway company now alleges that the trial court erred in refusing to permit the question last above quoted to be answered and refusing the offer of proof. As to the question, the court did not err in refusing to permit it to be answered, as it was and is absolutely unintelligible. Neither was the ruling of the court erroneous in excluding the offer made by the railway company. If counsel thought that the evidence embraced in their offer was material and competent and that the witness on the stand would give such testimony they should have asked him the question.

11. The final error alleged relates to the instructions of the trial court; but this error is simply a criticism upon the instructions. The instructions were correct in every particular. There is no error in the judgment sought to be reversed, and the same is in all things

**AFFIRMED.**

Post, J., not sitting.

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39	828
44	226
44	687
39	828
45	780
39	828
47	629
48	431

**WILLIAM NOSTRUM V. ANDREW S. HALLIDAY.**

FILED MARCH 21, 1894. No. 5604.

- 1. Agency: EVIDENCE.** While evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency, the testimony of such person, if not otherwise incompetent, is admissible for that purpose.
- 2. Vendor and Vendee: STATEMENT AS TO VALUE OF LAND: RESCISSION.** As a general rule, a statement by a vendor or his agent in regard to the value of land is merely the expression of an opinion and not a representation of a fact upon the falsity of which an action to rescind may be based.

3. **Action to Rescind Contract of Sale: EVIDENCE.** In an action to rescind a contract where the above general rule is applicable, evidence of the actual value of the land is immaterial.
4. ———: **FALSE REPRESENTATIONS: EVIDENCE: PLATS.** In an action to rescind a conveyance of land on the ground of false representations in regard to its character some of the representations relied upon were contained in a plat submitted to the vendee. There was evidence tending to show that the plat had been lost, but another plat was admitted in evidence upon proof by a witness that it was a copy to the best of his knowledge; that he thought his wife made it because it looked like her writing, but did not know who made it or under what circumstances, and he had not compared it with the original. *Held*, That this evidence was insufficient to prove that the plat offered was a copy of the original and that its admission was erroneous.

ERROR from the district court of Saline county. Tried below before BUSH, J.

*E. E. McGintie and Robert Ryan*, for plaintiff in error.

*F. I. Foss and Palmer & Hendee*, contra.

IRVINE, C.

Prior to the 25th day of September, 1891, Andrew S. Halliday was the owner of the furniture and other personal property in a hotel at Friend, and William Nostrum was the owner of the northwest quarter of section 4, township 3, range 14, in Franklin county. On that day an exchange was effected whereby Halliday took the land in exchange for the hotel property. In November of the same year this action was instituted by Halliday before a justice of the peace in replevin and the hotel property seized under the writ and delivered to Halliday. The appraised value of the property being in excess of the jurisdiction of a justice of the peace, the case was certified to the district court of Saline county and there tried. The result was a verdict and judgment for the plaintiff Halliday.

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The theory of Halliday's case was that he had been induced to make the exchange by false representations in regard to the land, and the action was in effect one at law for the rescission of the contract. It is somewhat difficult from the record to analyze the case, the absence of formal pleadings being probably sufficient to explain the difficulty. The only representation it is claimed Nostrum made in regard to the land is that it had cost him \$2,800, and there is not a syllable of evidence tending to show that this representation was false. It is claimed, however, that one Davis was the agent of Nostrum in making the exchange, and that Davis made certain representations through letters passing chiefly between Davis and one Moeller, the agent of Halliday. The first point in controversy is in regard to Davis' agency, the question being raised upon assignments of error relating to the admissibility of the letters referred to. When these letters were offered and the objections made there was really no evidence sufficient to warrant a finding as to the existence of such agency. All that was made to appear by the plaintiff's testimony was the fact that Davis had acted in conducting the negotiations, and had introduced the principals who had completed the negotiations between themselves; and further, that after the transaction Nostrum had denied making any representations, to which Halliday made answer that Nostrum's agent, Davis, had done so, to which Nostrum replied that Davis was not his agent at the time the trade was made; that he had been prior to that time, but they had settled their affairs. There is also the testimony of Mr. Moeller, at first that Nostrum had told him that Davis was his agent, but upon further inquiry he states that all that Nostrum said was that if Moeller wished to correspond with Nostrum, Davis would know where to find him. It needs no argument to prove that this evidence was insufficient to establish an agency. All that it tends to show is that Davis was instrumental in bringing the parties to-

gether, but at whose instance and upon what authority, or whether upon any authority, does not appear. But Davis himself was called as a witness and stated that he was partly instrumental in bringing the parties together; that he introduced them; and on cross-examination he was asked if Nostrum had left him this land to trade. His answer was, "not especially;" that he and Nostrum "frequently had deals;" that they were both in the same business and helped one another to get trades; that he "was acting in the capacity of his copartner, not as his agent;" and that he was to get a commission if the trade went through. We think this was sufficient to justify the jury in finding that there existed some general authority from Nostrum to Davis to assist in making such trades and justified the court in leaving to the jury the question of agency.

In this connection our attention is called to the case of *Stoll v. Sheldon*, 13 Neb., 207. That case simply holds that an attorney at law, by virtue of his employment to make collections, has no authority to release a surety upon a promissory note; but in the opinion the case of *Graul v. Strutzel*, 53 Ia., 712, is cited as holding that an agent's authority cannot be shown by his own testimony. This was evidently a careless use of language by the court, for what *Graul v. Strutzel* decides is the familiar proposition that an agent's authority cannot be proved by the declarations of the agent, and that was the only question pertinent to the decision of *Stoll v. Sheldon*. The testimony of the agent, where not upon other grounds incompetent, is admissible to prove his authority, but his mere acts or declarations, not brought home to the principal, or ratified by the principal, are not admissible. As nearly as can be gathered, in the absence of formal pleadings of fraud, the representations relied upon as having been made by Davis are as follows: That the Franklin county land was worth \$20 per acre; that the buildings were good, the land principally table land, smooth, with living water upon it, making a

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good farm; that a large portion of the land was cultivated, and that the land had improvements in the nature of a house, a barn, a windmill, and a tank. There is sufficient evidence to justify the jury in finding that most of these representations, if made, were false.

Certain depositions were offered in evidence containing testimony as to the actual value of the land, the witnesses swearing that the land was worth about \$5 per acre. This testimony was all received against Nostrum's objections, and its admission is assigned as error. We think that its admission was erroneous, and prejudicially so. While this was an action at law, its object was simply a rescission of the contract and not the recovery of damages; therefore, the question of value was immaterial. It is true that there was evidence that Davis had represented that the land was worth \$20 per acre, but as a general rule a representation of this character upon the part of a vendor or his agent is merely an expression of opinion and cannot be made the basis of an action to rescind upon the ground of false representations. There is nothing in this case to create an exception to the rule. It was not pretended that Nostrum or Davis had any particular knowledge in regard to the value, or that the situation was such that Halliday was compelled to rely, or justified in relying, upon their opinion.

In one of Davis' letters to Moeller, offered in evidence, he states that he inclosed a description of the land. Moeller testifies that a plat was enclosed in the letter. A plat was received in evidence over Nostrum's objections, but it is admitted that this was not the original plat inclosed in the letter. Moeller testifies that he showed the plat to Halliday and that he afterwards lost it. The proof of the loss is not very satisfactory, but it was probably sufficient to justify the court in admitting secondary evidence. But there was not sufficient proof to justify the reception of the plat offered as such secondary evidence. Moeller says that

it is an exact copy, to the best of his knowledge. He cannot tell who made it. He did not compare it with the original; it looks like the original. He thinks his wife copied it because it looks like her writing. This is substantially all upon the subject. It will be observed that it was not shown that the plat was a copy, the person who made it was not produced, and the witness by whom it was proved did not know with certainty who made it or under what circumstances, and did not pretend to say that it was a copy, but merely that it looked like the original plat.

This plat was very material. One of the principal questions in controversy was as to the character of the land and the extent of the cultivated portion. The only representations upon this subject are found upon the plat introduced. Another of the representations counted upon was the existence of a windmill. The only representation as to this windmill is found upon this plat. A witness testified to a creek cutting through the land, in many places making deep depressions and rendering the surface uneven and broken. Except as to the general statement in one of the letters that the land was smooth and mostly table land, the only representation upon this subject is upon the plat, which shows only a creek passing through the southeast corner of the quarter section. We think the admission of this plat was erroneous.

Halliday testifies he discovered the fraud within a very few days after the completion of the contract, and complained of it to Nostrum. An agreement was entered into in writing on October 5, 1891, whereby Halliday was given the privilege of exchanging the Franklin county land before January 1, 1892, for any such lands or city property as Nostrum might own at the time of the agreement or at the time the exchange might be made, to the amount of \$2,300. The effect of this agreement is the subject of much argument. No method was pointed out for selecting the land in exchange or determining its value. But the question of

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 York Park Building Association v. Barnes.
 

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its validity as an enforceable agreement would probably be not very material, as there is at least a strong foundation for argument upon the ground that it constituted an election on the part of Halliday to abide by the contract and retain the land for the purpose of making the exchange contemplated by the subsequent agreement. We find no assignment of error, however, sufficient to raise this question. No instructions were given upon the subject, but none was requested by either party, and it is not assigned as error that the verdict was not sustained by sufficient evidence or that it was contrary to law.

The sufficiency of the evidence as to Halliday's reliance upon the representations of Davis might also be commented upon had it been sufficiently assigned. The point is argued upon an instruction which omitted this element, but the instruction complained of did not purport to state all the elements necessary for a recovery. It only defined what was necessary in order to constitute a fraudulent misrepresentation, and the following instruction distinctly told the jury that in order to sustain the action the person to whom the representation was made must believe it to be true and act upon the faith of it.

For the errors in the admission of evidence the judgment is

REVERSED.

POST, J., and RYAN, C., not sitting.

39 834  
48 402  
39 834  
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YORK PARK BUILDING ASSOCIATION V. JOHN W.  
BARNES.

FILED MARCH 21, 1894. No. 4946.

1. **Failure to Instruct Jury: NEW TRIAL.** It is the duty of the trial judge to instruct the jury upon the law of the case, whether requested by counsel to do so or not, and where the

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judge has failed to instruct the jury, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded.

2. **Corporations.** A corporation which has for its object the purchase of land and the construction of houses thereon (the funds being realized from the capital stock paid in by subscribers in installments), and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business and authorized by the general incorporation law.
3. **Pleading: CONTRACTS.** In pleading a contract which need not by common law be in writing, but where a writing is required by a positive statute, it is not necessary to plead that the contract was written, at least where no objection is made by motion to the certainty of the pleading.
4. **Corporations: SUBSCRIPTIONS: ESTOPPEL.** One to whom stock in a corporation is issued, who pays assessments on such stock, acts as an officer of the corporation and takes part in its management, is estopped to deny his subscription.
5. **Contracts: SUBSCRIPTIONS: STOCK.** An agreement made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, and that he will not be required to pay his subscription therefor, is void, and the corporation may enforce payment of such subscription, notwithstanding such agreement.

**ERROR** from the district court of York county. Tried below before COCHRAN, J.

*Sedgwick & Power*, for plaintiff in error.

*George B. France*, contra.

IRVINE, C.

This was an action by the plaintiff in error against the defendant in error to recover on a stock subscription. In instructing the jury the court in the first place stated at considerable length the issues raised by the pleadings and submitted the pleadings to the jury with the instructions. The court next stated to the jury that the plaintiff, in or-

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der to recover, must establish the material allegations of its petition by a preponderance of evidence. Then an instruction was given as to what constituted a preponderance of evidence, and this was followed by the usual instruction submitting to the jury the credibility of witnesses and the weight to be attached to evidence. No other instructions were given. One of the assignments in the motion for a new trial and the petition in error is that the court erred in not instructing the jury as to the law of the case.

In *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109, it was said: "It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them, and should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by counsel or not, this court would not hesitate to grant a new trial." The same principle was substantially announced in *Aultman v. Martin*, 37 Neb., 827. An entire failure to instruct the jury in regard to the law of the case is very different from an omission to instruct in regard to some particular phase of the case or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination not only of facts but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion. (*Sandwich Mfg. Co. v. Shiley, supra.*) But the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must, therefore, examine the record in order to determine that question.

The petition alleges the corporate existence of the plaintiff since August 6, 1887, and the articles of incorporation and by-laws are made a part of the petition. It then alleges that on the 3d day of August, 1887, the entire amount of capital stock was subscribed; that the defendant subscribed for one share thereof and paid upon said share the sum of \$108.65. The petition then alleges that further payments to the amount of \$190 are due and unpaid, and that in addition thereto the defendant is indebted upon his share for certain fines, interest, and penalties.

The answer is quite long. In effect, it denies the corporate existence of the plaintiff; denies the power of the plaintiff to make assessments or impose fines; it alleges that, at the time of the pretended incorporation of the plaintiff, its officers and stockholders represented to the defendant that they would put one share of stock in his name for the sake of his influence, and that he should not at any time be required to pay therefor; that it was represented to him that street cars should be run through the property owned by plaintiff near defendant's residence, and that commodious and beautiful residences would be built near defendant's property, and that such promises had not been fulfilled. The defendant further alleged that he had acted as president of such pretended incorporation for one year, and that his services in that behalf were worth \$1,000, for which he asks judgment. It was further averred that defendant had never at any time subscribed for stock of the plaintiff, but simply permitted, under the circumstances stated, stock to be placed in his name. It was also averred that sufficient stock was never subscribed to complete the organization of the plaintiff. The action was originally begun in the county court, and the answer asserts that that court had no jurisdiction of the subject-matter.

The plaintiff, in reply, in effect denies the allegations of new matter in the answer, and in addition to that denial avers that the defendant had acted as a stockholder in the

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corporation and acted as president thereof; had paid for some time his assessments and dues, and as president had executed evidences of indebtedness on behalf of the corporation, and generally held himself out as a stockholder. The reply further denies that as president or other officer of the corporation the defendant was entitled to any salary for his services.

The defendant asserts that the petition does not state a cause of action. If this were so, of course the judgment in favor of the defendant would not be reversed; but we think a cause of action is stated. Upon this point the defendant urges illegality of the incorporation. There is good authority for holding that one who subscribes for stock in a corporation, acts as an officer thereof, and takes part in its management, cannot dispute the validity of the corporation. (*Phoenix Warehousing Co. v. Badger*, 67 N. Y., 294.) But the question raised in argument upon this point does not relate to any irregularity in the proceedings, but is directed to the point that the corporation was not for a legal object. While the name adopted by the corporation is one of the distinctive terms used in the act relating to building and loan associations (Session Laws, 1891, ch. 14), and while the use of such a name is forbidden to corporations not complying with that act, that prohibition applies only to corporations organized after the adoption of the act of 1891. This corporation was organized in 1887. It is not a building association, or building and loan association, as those terms are used in the recent statutes. Its objects, as stated in its articles of incorporation, are to buy and sell real estate, to purchase or erect buildings and to rent or sell the same, to sell its property, to borrow money and to give mortgages to secure the payment thereof. A further inspection of the articles shows that the specific purpose was, in effect, a scheme of co-operation whereby the stockholders, by obtaining the rights and assuming the duties of a corporation, obtained for that corporation a tract

of land subdivided into lots, erected houses upon these lots, provided for the payment of the stock in monthly installments, and finally provided for the allotment of the lots and lands among the stockholders in discharge and satisfaction of the stock. The general corporation laws, chapter 16, Compiled Statutes, section 123, permit any number of persons to become incorporated for the transaction of any lawful business. The business as outlined by the articles of incorporation is certainly lawful, and we cannot see any force to the argument that the formation of the corporation was not authorized by the law of the state.

It is next asserted that the petition does not allege any subscription in writing to the stock. By the more recent authorities a subscription in writing is not necessary (Cook, Stock & Stockholders, sec. 52); but if a writing were required, it would be only because of the statute of frauds and not upon any principle of the common law. In such a case it need not be pleaded that the agreement was in writing, at least when the question is raised after verdict and judgment. (*Schmid v. Schmid*, 37 Neb., 629.)

It is next asserted that the petition does not specifically allege that the entire capital stock had been subscribed. The petition does allege that on the 3d day of August, 1887, the entire amount of the capital stock required by the articles of organization was subscribed. This is a sufficient averment, at least, unless objection be made by motion as to its certainty.

Possibly the denial of the jurisdiction of the county court demands consideration. This contention seems to be based upon the proposition that the action relates to real estate. Upon this subject the law only denies to the county court jurisdiction in actions upon contracts for the sale of real estate, in matters wherein the title or boundaries of land may be disputed, and to order or decree the sale or partition of real estate. (Comp. Stats., ch. 20, sec. 2.) This case does not fall within any of these classes.

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The mere fact that the corporation had for its object transactions in real estate makes the subscription for its stock none the less personal in its character.

Subscription to the stock was denied. There was evidence tending to show that the original subscription book had been destroyed by fire and it did not appear that the defendant ever had in his manual possession a certificate of stock, but it did appear that he authorized a share to be issued to him; that a certificate had actually been issued; that only stockholders were eligible to office; that he was, upon the organization of the company, elected its president and served for a long time in that capacity, and that he had paid a number of installments upon a share of stock. This was sufficient to charge him as a subscriber, and he was estopped to deny his subscription. (*Sanger v. Upton*, 91 U. S., 56.)

There was considerable evidence upon the issue raised by the answer as to the agreement made by promoters of the corporation that the defendant should never be required to pay. Such an agreement is void. To permit its enforcement would operate as a fraud upon the other stockholders subscribing upon the faith of the defendant's subscription, as well as upon the creditors of the corporation. The following cases, while not all precisely in point, firmly establish this principle: *Downie v. White*, 12 Wis., 195; *Bates v. Lewis*, 3 O. St., 459; *Wetherbee v. Baker*, 35 N. J. Eq., 501; *Phoenix Warehousing Co. v. Badger*, 67 N. Y., 294; *Mann v. Cooke*, 20 Conn., 178; *Upton v. Tribilcock*, 91 U. S., 45; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt., 465.

All these issues were stated to the jury in form of an abstract of the pleadings without stating any of the principles of law governing their determination. Some of them, as a matter of law, should have been withdrawn from the jury; all of them involved questions of law which under the charge the jury was permitted to deter-

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mine. Upon a review of the whole case we are satisfied not only that the jury may have taken a wrong view of the law, but that in all probability it did so. Under these circumstances the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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G. C. ST. JOHN v. H. F. SWANBACK.

39	841
47	669
47	708

FILED MARCH 21, 1894. No. 5365.

1. **Replevin.** The plaintiff in replevin must recover on the strength of his own title or right of possession, and not on the weakness of his adversary's.
2. ———: **EVIDENCE: REVIEW.** Where, in replevin, there is a general denial and there is not evidence sufficient to show title or right of possession in the plaintiff, a judgment for the defendant will be affirmed, without considering errors in the admission of defendant's testimony or in the instructions relating to the right to recover.
3. ———: ———: **DAMAGES: REMITTITUR.** A replevied from B a buggy which B, as constable, had seized under an execution against C. The execution amounted to something over \$10. The admitted value of the buggy was \$150, and no damages were proved on behalf of defendant. The jury returned a verdict for the defendant, assessing the value of his possession at \$150, and his damages at \$10. The defendant remitted \$150 from the verdict, and judgment was entered for \$10. *Held*, That the remittitur cured the errors in the assessment of the amount of recovery.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

*C. S. Polk, E. H. Wooley, and Mockett, Rainbolt & Polk,*  
for plaintiff in error.

*A. N. Sullivan, contra.*

## IRVINE, C.

The defendant in error, a constable, levied upon a buggy as the property of one Baird. St. John replevied it. The theory of the plaintiff was that Baird had borrowed the buggy from plaintiff for the purpose of driving from Lincoln to Greenwood, in Cass county, and that it had been seized in Greenwood as Baird's property, when in fact it belonged to St. John. An answer containing a general denial was filed. The jury in the district court found a verdict in favor of the defendant, assessing the value of his possession at \$150, and his damages at \$10. The judgment under which the levy was made was \$6.10, together with costs, taxed at \$3.15. There were constable's fees upon the execution amounting to \$1. The district court overruled a motion for a new trial upon the defendant's filing a remittitur for \$150, and rendered judgment for the defendant for \$10.

Numerous errors are assigned, but it will not be necessary to consider many of them. The proof wholly fails to show any ownership in St. John. St. John was not a witness. His whereabouts was apparently unknown to his attorneys at the time of the trial. Baird was not a witness. The only evidence directed in any degree towards proof of ownership in St. John was that of J. Cline and A. B. Cline. The former testifies that he owned a livery stable in Lincoln, and that St. John had a buggy which he kept at the stable, and that this was the buggy which Baird drove to Greenwood. But on cross-examination it appears that Baird had charge of the stable and that Cline knew nothing as to the ownership of this buggy, except that he had seen St. John's name in the books of the stable. A. B. Cline testifies that he was employed about the stable; that he knew St. John by sight, and had seen St. John drive into the stable with the buggy. This was all he knew. This was entirely insufficient to warrant

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the jury in finding that St. John was the owner, and in any view of the evidence the defendant was entitled to a verdict. The plaintiff in replevin must recover on the strength of his own title, and the court would have been warranted in directing a verdict for the defendant. Any errors in the admission of defendant's evidence or in the instructions are, therefore, without prejudice.

It is said that there was prejudicial error in instructing the jury that if it found for the defendant it should find the value of the property at \$150. This error was cured by the remittitur entered. There was no foundation for any verdict for substantial damages in favor of the defendant, and the verdict was in that respect erroneous. But the value of defendant's possession was shown by the execution to be at least \$10, so that when a remittitur was filed for \$150, and judgment entered for only \$10, these errors were cured.

JUDGMENT AFFIRMED.

Post, J., not sitting.

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SUSAN B. MYERS ET AL. V. ALEXANDER MCGAVOCK  
ET AL.

FILED MARCH 22, 1894. No. 5059.

1. **Guardian and Ward: SALE OF MINORS' LAND: VALIDITY OF PROCEEDINGS: COLLATERAL ATTACK: RES ADJUDICATA.** A sale and conveyance of the real estate of certain minors, made by their guardian in pursuance of a license of a district court of this state granted therefor, examined, and *held*, that such sale and conveyance would not be held void in this, a collateral proceeding, because (1) it appears that at the time such guardian made application to the district court for a license to sell the real estate of his wards they resided in the state of Illinois, and the guardian held his appointment from a court in the state of

39	843
40	61
39	843
42	876
39	843
46	810
39	843
48	458

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Iowa, it appearing that at the time said guardian was appointed by the Iowa court his wards resided in that state; nor because (2) said wards took up their residence in the state of Illinois after the appointment of their guardian in the state of Iowa, as their change of domicile did not deprive said guardian of control over them or their property; nor did the residence of said wards in the state of Illinois, at the time the guardian made the application to sell, preclude the jurisdiction of the district court; nor because (3) the authenticated copy of the letters of guardianship, filed in said district court, did not contain the certificate of a judge or presiding magistrate of the Iowa court that the certificate and attestation of the clerk of the Iowa court, attached to said copy of letters of guardianship, was in due form of law; as the question whether the certified copy of the guardian's appointment was the best evidence, or competent evidence, was one for the district court hearing the application for license, and it was for that court to say whether it was satisfied with the evidence offered to prove that the guardian was the duly appointed, qualified, and acting guardian of the heirs whose real estate he had made application to sell; and the finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, because such court made such finding or rendered such judgment on incompetent evidence (*Menage v. Jones*, 40 Minn., 254, followed); nor because (4) the petition for license to sell the real estate was not verified by the guardian, as this did not affect the jurisdiction of the district court, nor render its proceedings void; nor because (5) the verification of the petition for license was made by the guardian's attorney who conducted the proceedings (*Ellsworth v. Hall*, 48 Mich., 407, followed); nor because (6) the bond given by the guardian to the judge of the district court was not formally approved by him (*Emery v. Vroman*, 19 Wis., 724, and *Pursley v. Hayes*, 22 Ia., 11, followed); nor because (7) the record of the proceedings on which the guardian's sale was based contained no copy of a notice of the sale posted in three of the most public places in the county in which said sale was held, as the district court which licensed the sale, in its order confirming the same, made a finding that the proceedings of the guardian in making the sale had been in all respects regular and in conformity to law, and this court would presume that the district court had before it sufficient evidence on which to base such finding; nor because (8) the sale was not made by the guardian personally, but through his attorney who conducted the proceedings in court; nor because (9) the property sold and conveyed by the guardian was described as "the N. E. two-thirds ( $\frac{2}{3}$ ) of lot eight (8) in block two hun-

dred and three (203), in the city of Omaha, being all that portion of said lot not belonging to the Union Pacific Railway Company," as this description was sufficient to enable the property to be identified, and therefore not void for uncertainty.

2. **Ejectment: EVIDENCE.** In an ejectment suit, where the defendant claims title by virtue of a guardian's sale and conveyance, the fact of the approval of the bond by the judge of the court granting the guardian a license to sell, like any other fact, may be proved by the best evidence attainable.
3. **Guardian and Ward: POWER OF GUARDIAN: COURTS.** The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute, and our laws confer no authority on a natural guardian, as such, to dispose of the real estate of his wards; and no district court has jurisdiction to authorize a natural guardian, as such, to sell the real estate of his wards. The only guardian a district court has jurisdiction to license to sell the property of his wards is a guardian appointed and commissioned by a court having authority to appoint guardians; and it must appear that such guardian had accepted such appointment, had qualified, and was acting.
4. **A natural guardian may become the legal guardian** of his wards, but in order to become such he must be appointed by the proper authority, accept such appointment, and qualify as such legal guardian.
5. **An application by a guardian for license to sell the real estate of his wards for their maintenance and education is a proceeding *in rem*,—one instituted by their guardian for their benefit.** It is, in effect, the application of the wards. It is not a proceeding adversary to them; and notice to them of such application is not essential to the jurisdiction of the district court to grant the license. *Mohr v. Manierre*, 101 U. S., 417; *Scarf v. Aldrich*, 32 Pac. Rep. [Cal.], 324; *Mohr v. Porter*, 51 Wis., 487, followed.
6. **Guardians: BONDS: DUTY OF COURTS.** The statutes of this state require courts having authority to appoint guardians to see to it that the persons so appointed are capable and honest; that they give and keep good the bonds required by the statute for the faithful execution of their trust; and render to the court, at frequent intervals, accounts of their guardianship.
7. **Sale of Ward's Land: LICENSE: DISTRICT COURTS.** The law has conferred on the district judges in the first instance the exclusive power to say whether the facts exist which justify the sale of a ward's property by his guardian; to say whether, in the

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judgment of the court, the sale asked to be authorized is for the best interests of the ward; and this authority should not be exercised by the district judges as a matter of course, but only after investigation and inquiry into all the facts, and not then unless the judge is convinced that such sale is a necessity or is for the best interests of the ward.

8. ———: NOTICE TO WARD. It seems that notice to the wards of an application made by their guardian for the sale of their real estate to pay debts is essential to the jurisdiction of the district court to license such sale; and that a guardian's sale and conveyance of the real estate of his wards for such purpose without such notice is void. (*Mickel v. Hicks*, 19 Kan., 578.)
9. ———: NOTICE. The provisions of section 109, chapter 23, Compiled Statutes, 1893, are not applicable to a proceeding instituted by a guardian of minors for a license to sell their real estate for their education and maintenance. The meaning of said section is that when any person other than the minors—such as an insane person, an idiot, a spendthrift, or a drunkard—shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs presumptive, that is, all such persons as would inherit such person's property, should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them.
10. ———: APPLICATION FOR LICENSE: APPEARANCES. Where an application was made by a guardian of minors to sell their real estate and the mother and an adult brother of such minors entered their appearance in said proceeding and consented that the license to make such sale might be granted as prayed, *held*, that the interest of said widow and adult son in said real estate was not therefore divested by the sale and conveyance of the real estate made by said guardian in virtue of said proceeding.
11. ———: PURCHASERS: ADVERSE POSSESSION: LIMITATION OF ACTIONS. But where such proceedings purported to dispose of the interest of the adult parties and the purchaser entered into exclusive possession, such proceedings and entry operated as an ouster of such adults, and such possession being adverse and continuing for the statutory period divested the adults' title.
12. A conveyance of real estate made to a railway corporation chartered by an act of congress, which, under our constitution, is incompetent to take title, is not void, but only voidable. The title of such corporation to such real estate is valid against every one but the state, and can be divested only

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in proceedings brought by the state for that purpose. *Carlou v. Aultman*, 28 Neb., 672, followed.

13. **Corporations: ADVERSE POSSESSION: TITLE.** Where a corporation, chartered by an act of congress, and incompetent by reason of our constitution to acquire title to real estate in this state, has been in open, notorious, exclusive, and adverse possession of real estate under a claim of title for ten years, such corporation has a valid title to such real estate, as against all persons, except the state of Nebraska.
14. **Statute of Limitations: CORPORATIONS.** Where the statute of limitations has begun to run against the owners of real estate in the adverse possession of another, a conveyance and delivery of possession of such real estate by such adverse occupier thereof to one incompetent to take title to such real estate will not arrest the running of the statute of limitations against such owners.
15. **Statutes: CONSTRUCTION.** The rule that the legislature, by adopting the statute of another state, thereby adopts the construction placed on said statute by the highest court of that state, does not apply when such construction was not placed on said statute until after its adoption.
16. **Railroad Companies.** The provisions of chapter 16, Compiled Statutes, 1893, in so far as they are applicable, apply to all railroad corporations operating roads in this state, whether domestic or foreign corporations.
17. **Railroad Companies: EASEMENTS: VALIDITY OF SETTLEMENT WITH GUARDIAN.** In 1871 the Union Pacific Railway Company, a corporation chartered by act of congress, was operating its railroad in this state, and acquired the right to occupy, for depot purposes, certain real estate, the property of minor heirs, by making settlement with, and receiving a release and discharge from, the legal guardian of said minors for the damages sustained by them by reason of said occupation of their real estate. *Held*, That neither the constitution, nor any law in force at that time, prohibited such corporation from building and operating its road in this state, and that such settlement made with said guardian and release and discharge executed by him in pursuance of said settlement were valid, and vested in said corporation a perpetual easement in said real estate.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

The facts are stated in the opinion.

*Guy R. C. Read* and *William D. Beckett*, for plaintiffs in error:

The statute of limitations had not run against the action. (*State v. Scott*, 22 Neb., 628; *Trester v. Missouri P. R. Co.*, 23 Neb., 242; *Koenig v. Chicago, B. & Q. R. Co.*, 27 Neb., 699; *Parker v. Starr*, 21 Neb., 680; *McCann v. McLennan*, 2 Neb., 289; *People v. Gosper*, 3 Neb., 310; *Albertson v. State*, 9 Neb., 437; Angell, Limitations; secs. 204, 246; *Murray v. Baker*, 3 Wheat. [U. S.], 541, *Ruggles v. Keeler*, 3 Johns. [N. Y.], 264; *Erskine v. Messicar*, 27 Mich., 84.)

The guardian who made the sale was not the guardian of the persons of the minors, but only for their property in the state of Iowa, and he was not authorized to make an application to sell their property in this state. The guardian's sale and deed were void. (Secs. 58, 110, ch. 17, Gen. Stats., 1873; Freeman, Void Judicial Sales, sec. 10; *Bell v. Love*, 72 Ga., 125; *Dooley v. Bell*, 13 S. E. Rep. [Ga.], 284; *Pryor v. Downey*, 50 Cal., 388; *Pryor v. Madigan*, 51 Cal., 178; *Paty v. Smith*, 50 Cal., 153; *Roche v. Waters*, 72 Md., 264; *Frederick v. Pacquette*, 19 Wis., 541; *Chase v. Ross*, 36 Wis., 267; *Trester v. Missouri P. R. Co.*, 23 Neb., 242.)

The sale and deed are void because no notice of the application for license to sell was given to the wards either personally or by publication or in any other manner. (*Sitzman v. Pacquette*, 13 Wis., 325; *Frederick v. Pacquette*, 19 Wis., 569; *Blackman v. Bauman*, 22 Wis., 611; *Mohr v. Tulip*, 40 Wis., 66; *Mickel v. Hicks*, 19 Kan., 578; *Chicago, K. & N. R. Co. v. Cook*, 43 Kan., 83; *Bloom v. Burdick*, 1 Hill [N. Y.], 130; *Schneider v. McFarland*, 2 N. Y., 459; *Havens v. Sherman*, 42 Barb. [N. Y.], 636; *Stilwell v. Swarthout*, 81 N. Y., 109; *Pinckney v. Smith*, 26

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Hun [N. Y.], 524; *Jenkins v. Young*, 35 Hun [N. Y.], 569; *Perry v. Adams*, 98 N. Car., 167; *Harrison v. Harrison*, 106 N. Car., 282; *Stancill v. Gay*, 92 N. Car., 462; *Taylor v. Walker*, 1 Heisk. [Tenn.], 734; *Frazier v. Pankey*, 1 Swan [Tenn.], 75; *Wheatley v. Harvey*, 1 Swan [Tenn.], 484; *Winston v. McLendon*, 43 Miss., 254; *Root v. McFerrin*, 37 Miss., 17; *Planters Bank v. Johnson*, 7 S. & M. [Miss.], 449; *Gwin v. McCarroll*, 1 S. & M. [Miss.], 351; *Smith v. Denson*, 2 S. & M. [Miss.], 326; *Donlin v. Hettinger*, 57 Ill., 348; *Tell v. Young*, 63 Ill., 106; *Marshall v. Rose*, 86 Ill., 374; *Babbitt v. Doe*, 4 Ind., 355; *Doe v. Anderson*, 5 Ind., 33; *Guy v. Pierson*, 21 Ind., 21; *Doe v. Bowen*, 8 Ind., 197; *Good v. Norley*, 28 Ia., 188; *Fiske v. Kellogg*, 3 Ore., 503.)

A sale by guardian without notice to ward is void where statute requires all persons interested residing in the state to be cited when such application is made. (*Rule v. Broach*, 58 Miss., 552; *Hamilton v. Lockhart*, 41 Miss., 460; *Lyon v. Vanatta*, 35 Ia., 521; *Boyles v. Boyles*, 37 Ia., 592; *Arrowsmith v. Harmoning*, 42 O. St., 254; *Perry v. Brainard*, 11 O., 442; *Mauarr v. Parrish*, 26 O. St., 636; *Musgrave v. Conover*, 85 Ill., 374.)

Guardians' sale of real estate, without first giving bond required, is void. (*Sparhawk v. Buell*, 9 Vt., 41; *Stewart v. Bailey*, 28 Mich., 251; *Ryder v. Flanders*, 30 Mich., 336.)

On application to a court of equity for the support of a minor out of his separate estate, minors are always parties. (*Tompkins v. Tompkins*, 18 N. J. Eq., 303; *Stephens v. Howard*, 32 N. J. Eq., 244.)

A decided majority of the authorities is in favor of the position that notice to the minor whose real estate is to be sold is jurisdictional. (Freeman, *Void Judicial Sales*, sec. 16; Rorer, *Judicial Sales*, secs. 69-71.)

It has been the practice in Nebraska to give notice of some sort to the wards in cases of this kind. (*Trumbull v.*

*Williams*, 18 Neb., 144; *McClay v. Foxworthy*, 18 Neb., 295.)

The guardian's sale was void, because a bond was required by the court to be given as a condition precedent to the sale, in accordance with the provisions of section 61 of chapter 23, Compiled Statutes, and no such bond was given. (*McClay v. Foxworthy*, 18 Neb., 297; *McKeever v. Ball*, 71 Ind., 398.)

The receipt of money, from illegal sale, by heirs after becoming of age, does not estop them from disputing its validity. Their attention must be called specially to the point. (*Harmon v. Smith*, 38 Fed. Rep., 482; *Schnell v. City of Chicago*, 38 Ill., 382; *Messinger v. Kintner*, 4 Binn. [Pa.], 97; *Good v. Norley*, 28 Ia., 188; *Brant v. Virginia Coal & Iron Co.*, 93 U. S., 326; *Crest v. Jack*, 3 Watts [Pa.], 240; *Knouff v. Thompson*, 4 Harris [Pa.], 361; *Mohr v. Tulip*, 40 Wis., 66, 79; *Whyte v. City of Salem*, 4 Saw. [U. S. C. C.], 88; *Whyte v. Smith*, 4 Saw. [U. S. C. C.], 17; *Hill v. Ep'ey*, 31 Pa. St., 331; *Boggs v. Merced Mining Co.*, 14 Cal., 367; *Carpentier v. Thirston*, 24 Cal., 268; *Davis v. Davis*, 26 Cal., 38; *Fields v. Squires*, Deady [U. S. C. C.], 396; *Ryders v. Flanders*, 30 Mich., 336; *Stancill v. Gay*, 92 N. Car., 462; *Campbell v. Nesbitt*, 7 Neb., 300.)

In much stronger cases than this the courts have refused to apply the doctrine of estoppel so as to prevent the recovery of property by an heir or ward against one who holds a void administrator's or guardian's deed for it. (*Mohr v. Tulip*, 40 Wis., 66, 79; *Messinger v. Kintner*, 4 Binn. [Pa.], 97; *Good v. Norley*, 28 Ia., 188.)

*Francis A. Brogan*, for defendant in error McGavock:

The defendants McGavock and Hobbie had acquired a perfect title by prescription at the commencement of this action in ejectment, and the statute of limitations had run and was a complete bar to the action of the plaintiffs.

(*State v. Babcock*, 21 Neb., 602; *White v. Blum*, 4 Neb., 562; *State v. Silver*, 9 Neb., 89; *Green v. Sanford*, 34 Neb., 363; *Tyrrill v. Lamb*, 96 Pa. St. 464; *Van De Haar v. Van Domseller*, 56 Ia., 671; *Quimby v. Claflin*, 27 Hun [N. Y.], 611; *Western Union Telegraph Co. v. Way*, 83 Ala., 542; *Alabama Great Southern R. Co. v. Smith*, 81 Ala., 229; *Ely v. Early*, 94 N. Car., 1; *Bigham v. Talbot*, 63 Tex., 271; *Harral v. Gray*, 10 Neb., 187; *Fraedrich v. Flieth*, 64 Wis., 184.)

The first point urged is that the application should have been made by the guardian of the persons of the minors, instead of by the guardian of their property. There is no foundation for this either in reason, or in the terms of the statute, or in any adjudicated case. On the contrary the statute expressly says that it is the guardian who has been appointed, who should apply for leave to make the sale, and this has been uniformly held to mean the guardian of the property, not the guardian of the person or the natural guardian. (*Perry v. Carmichael*, 95 Ill., 519; *Fonda v. Van Horne*, 15 Wend. [N. Y.], 631; *Porter v. Tudor*, 9 Conn., 416; *Otto v. Schlapkahl*, 57 Ia., 226; *Shanks v. Seamonds*, 24 Ia., 131; *Deugenhart v. Cracraft*, 36 O. St., 549.)

The foreign court is presumed to have acted correctly in appointing a guardian. (*Taylor v. Kilgore*, 33 Ala., 214.)

A guardian of the property may remove his wards from one state to another without losing his relation to them, if the change is for the benefit of the wards, and is done with the consent of the surviving parent. (*Pedan v. Robb*, 8 O., 227; *Wheeler v. Hollis*, 19 Tex., 522; *Townsend v. Kendall*, 4 Minn., 412.)

The court hearing the application must determine whether a proper, authenticated copy of letters of guardianship from a foreign state has been presented to it, and its determination is final unless appealed from. It cannot be inquired into collaterally. (*Menage v. Jones*, 40 Minn., 254.)

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This court has held that it will not reverse a judgment for failure to verify the petition upon a direct proceeding in error. (*Fritz v. Barnes*, 6 Neb., 435; *Hershiser v. De-lone*, 24 Neb., 380; *Johnson v. Jones*, 2 Neb., 126.)

The same rule has been expressly held to apply to the verification by a guardian of the petition for license to sell real estate. (*Hamiel v. Donnelly*, 75 Ia., 93; *Ellsworth v. Hall*, 48 Mich., 407.)

The failure by an administrator to verify the petition under section 68 of chapter 23, Compiled Statutes, if it is a defect at all, does not affect the jurisdiction of the court, and cannot be attacked in a collateral proceeding. (*Trumble v. Williams*, 18 Neb., 144.)

A failure to formally approve the bond would not be fatal. (*Emery v. Vroman*, 19 Wis., 689\*; *Pursley v. Hayes*, 22 Ia., 11; *Hamiel v. Donnelly*, 75 Ia., 93.)

A failure to give the bond would not be fatal. (*Watts v. Cook*, 24 Kan., 278.)

When special statutory powers are conferred upon courts of general jurisdiction, or upon the judges thereof, and such powers are exercised judicially, that is, according to the course of common law and proceedings in chancery, their judgments cannot be attacked or impeached collaterally, and they are conclusively presumed to have the jurisdiction which they exercise. (*Pulaski County v. Stewart*, 28 Gratt. [Va.], 872; *Mills v. Paynter*, 1 Neb., 445; *Müller v. Finn*, 1 Neb., 289; *State v. Buffalo County*, 6 Neb., 461; *Jennings v. Simpson*, 12 Neb., 565; *Bryant v. Estabrook*, 16 Neb., 217; *Gould v. Loughran*, 19 Neb., 394; *McCormick v. Paddock*, 20 Neb., 489; *Deseret Nat. Bank v. Nuckolls*, 30 Neb., 768; *Menage v. Jones*, 40 Minn., 254; *West Duluth Land Co. v. Kurtz*, 45 Minn., 380.)

Notice to the heirs is not of the essence of the court's jurisdiction. (*Grignon v. Astor*, 2 How. [U. S.], 319; *Seward v. Didier*, 16 Neb., 62; *Smith v. Race*, 27 Ill., 287; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Mohr v. Porter*,

51 Wis., 487; *Trumble v. Williams*, 18 Neb., 154; *Miller v. Sullivan*, 4 Dillon [U. S. C. C.], 343; *Good v. Norley*, 28 Ia., 188; *Seward v. Didier*, 16 Neb., 58; *Gager v. Henry*, 5 Saw. [U. S. C. C.], 237.)

In the following cases it has been held that the court acquires jurisdiction to order the sale of a ward's property upon the filing of a proper petition by the proper person, and that the decree of the court ordering the sale is binding and conclusive, notwithstanding any irregularities in the proceedings: *Shaw v. Ritchie*, 136 U. S., 519; *Schaale v. Wasey*, 70 Mich., 414; *West Duluth Land Co. v. Kurtz*, 45 Minn., 380; *Menage v. Jones*, 40 Minn., 254; *Arrowsmith v. Gleason*, 46 Fed. Rep., 256; *Fitch v. Miller*, 20 Cal., 352; *Shelby v. Harrison*, 84 Ky., 144; *Butler v. Stephens*, 77 Tex., 599; *Mulford v. Beveridge*, 78 Ill., 455; *Mulford v. Stalzenback*, 46 Ill., 303; *Marquis v. Davis*, 113 Ind., 219; *Thompson v. Tolmie*, 2 Pet. [U. S.], 157; *Dexter v. Cranston*, 41 Mich., 448; *Pfirman v. Wattles*, 49 N. W. Rep. [Mich.], 40; *Williams v. Williams*, 18 Ind., 345; *Spring v. Kane*, 86 Ill., 580; *Benefield v. Albert*, 132 Ill., 665; *Palmer v. Oakley*, 2 Doug. [Mich.], 448.

The settlement between the guardian and ward after coming of age is binding and conclusive, and cannot be attacked collaterally, and must prevail as between the parties, unless impeached by a direct proceeding. (*Candy v. Hanmore*, 76 Ind., 125; *King v. King*, 40 Ia., 120; *Lynch v. Rotan*, 39 Ill., 14; *Brodrib v. Brodrib*, 56 Cal., 563.)

When a ward accepts the proceeds of a sale of real estate made by the guardian with apparent legal authority, he thereby ratifies the sale and makes the acts of the guardian his own. (*Seward v. Didier*, 16 Neb., 58; *Parmelee v. McGinty*, 52 Miss., 475; *Handy v. Noonan*, 51 Miss., 166; *Hatcher v. Briggs*, 6 Ore., 31; *Brazee v. Schofield*, 2 Wash. Ter., 209; *Brazee v. Schofield*, 124 U. S., 495.)

*John M. Thurston and W. R. Kelly*, for defendant in error Union Pacific Railway Company.

*Montgomery, Charlton & Hall*, for defendants Hobbie.

RAGAN, C.

This is a suit in ejectment brought by Susan B. Myers, Sarah E. Myers, Luella G. Myers, Fannie B. Myers, and Stephen B. Myers against Alexander McGavock and wife, Henry C. Hobbie, and C. E. Hobbie, his wife, Helen C. Hobbie and her husband, and the Union Pacific Railway Company to recover possession of an undivided three-fourths interest in and to lot 8, block 203, in the city of Omaha. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict in favor of the defendants. The court having refused to set this aside, and having rendered judgment thereon, the plaintiffs below bring the case here on error. All parties claim title under one Henry B. Myers, who died seized of the premises June 14, 1864. The plaintiffs in error claim as his widow and heirs. The defendant in error Alexander McGavock claims a portion of the premises by virtue of a sale and conveyance thereof to him, made by the guardian of the minor heirs of Henry B. Myers. The Hobbies hold under a conveyance from McGavock, and their claim will not be further noticed. The Union Pacific Railway Company holds possession of a portion of the lot occupied by it by virtue of a conveyance from McGavock, and holds possession of the remainder of such portion of said lot as it occupies by virtue of an appropriation thereof for railroad purposes on May 15, 1871, and a settlement then made with the guardian of the minor heirs of said Henry B. Myers for all damages accruing to said minors by reason of said appropriation of said portion of said lot.

We will first dispose of the case so far as the defendant in error Alexander McGavock is concerned. The point relied upon by the able and industrious counsel for plaintiffs in error to defeat McGavock's title is, that the guardian's deed, by virtue of which he claims, and the proceedings and sale on which said deed is based were and are void. Philip Myers, on the 8th of November, 1864, was, by the county court of Mahaska county, Iowa, appointed guardian for the minor children of Henry B. Myers, deceased, who, it appears, died intestate shortly before that time in said county. Philip Myers accepted said appointment and duly qualified as such guardian. On the 13th day of June, 1874, he filed a petition in the district court of Douglas county setting forth his appointment as guardian; the names and ages of his wards; that as heirs of Henry B. Myers, deceased, they were owners of the real estate in controversy here; that it was necessary for the support, care, maintenance, and education of his wards that said real estate should be sold, and prayed said district court for a license for such purpose. In accordance with the prayer of the petition of said guardian the district court of Douglas county made an order authorizing the guardian to sell the real estate of his said wards; and that portion of said lot not theretofore appropriated as hereinbefore stated by the Union Pacific Railway Company was sold to the defendant in error Alexander McGavock. The district court of Douglas county confirmed this sale, and, in pursuance thereof, and the order of the court, the guardian executed to the defendant in error Alexander McGavock the deed under which he claims title. The plaintiffs in error allege that this deed is void for the following reasons:

1. That the guardian making the sale was not the guardian of the persons of said minors, but only of their property in the state of Iowa, and he was not authorized to make the application to sell their property in this state. The contention of the counsel is that since the minors had

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a guardian of their property and a guardian of their persons, the district court had jurisdiction to grant the license for the sale of their property to the guardian of their persons only. The minor children of Henry B. Myers had two guardians,—their mother, Susan B. Myers, who was their guardian by nature or natural guardian, and Philip Myers, who was their legal guardian; and if counsel are correct, then the only person the district court of Douglas county had jurisdiction to authorize to sell the property of these minor children was their mother. Section 58 of chapter 23, Compiled Statutes of 1893, provides: "When any minor, \* \* \* residing without this state, shall be put under guardianship in the territory or country in which he resides, \* \* \* the foreign guardian may file an authenticated copy of his appointment in the district court in any county in which there may be any real estate of the ward," etc. And section 59 of said chapter provides: "After filing such authenticated copy of his appointment, such foreign guardian may be licensed by the district court of the same county to sell the real estate of the ward of this state," etc. We are of opinion that the district court of Douglas county had no jurisdiction to grant the license to the natural guardian, as such, of the minor children of Henry B. Myers for the sale of their real estate. The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute; and our laws confer no authority on a natural guardian, as such, to dispose of the real estate of his ward, and no district court has jurisdiction to authorize a natural guardian, as such, to sell the real estate of his ward. The only kind of a guardian the district court has jurisdiction to authorize to sell the property of his ward is a guardian appointed and commissioned by a court having jurisdiction to appoint guardians; and to confer jurisdiction on a district court of this state to authorize a guardian to sell the property of his ward, it must appear that such guard-

ian had accepted such appointment and qualified and was acting as such guardian. The natural guardian may become the legal guardian of his ward, but in order to become such legal guardian he must be appointed such by the proper authority, accept such appointment and qualify as such legal guardian. (*Shanks v. Seamonds*, 24 Ia., 131.) As it appears that Philip Myers, at the time he made application to the district court of Douglas county for license to sell the property of his wards, was the duly appointed, qualified, and acting guardian of the minor children of Henry B. Myers, deceased, and such facts appeared in the petition filed by him for such license, on the face of the petition the district court had jurisdiction to grant him the license prayed for, and he was the proper party, and the only proper party, so far as the record discloses, to make such application.

2. That such guardian was not appointed in the state where the wards then resided. The evidence in the record does not sustain this point. In the petition filed in the district court, for the license to sell, it is stated that the wards were at that time residing in the state of Illinois; but it appears from the evidence that Henry B. Myers died at his residence in Mahaska county, Iowa. His widow petitioned the county court of that county to appoint Philip Myers guardian of her minor children. His estate was administered there, and he had there a homestead. These facts raise the presumption that at the time Philip Myers was appointed guardian his wards were residing in the county in which he was appointed, and since there is no evidence in the record to the contrary that fact must stand as established. It remains to be said of this point, however, that it would seem to be one which goes to the jurisdiction of the court that appointed the guardian rather than to the district court granting the license to sell. The fact that the wards of Philip Myers were residing in the state of Illinois at the time he made application to the Nebraska

court for license to sell their real estate did not deprive him of control over them or their property, nor the latter court of jurisdiction to grant the license.

3. That Philip Myers did not file in the district court of Douglas county an authenticated copy of his appointment as guardian. As already stated, Philip Myers was appointed guardian by the county court of Mahaska county, Iowa. This was done on the 8th of November, 1864. The application to sell the real estate of his wards was made to the district court of Douglas county in June, 1874. The guardian at that time filed in that court a copy of his said appointment as guardian by the Iowa court. This copy is certified to by the clerk and under the seal of the circuit court of said Mahaska county; and the contention here is that the district court of Douglas county was without jurisdiction to license this sale because the copy of the letters of guardianship was not such an authenticated copy of the guardian's appointment as is required by sections 58 and 59, quoted above. While it appears that the guardian received his appointment from the county court of Mahaska county, Iowa, the certificate of the clerk of the circuit court of said county attached to the letters of guardianship recites that said circuit court at that time had jurisdiction in probate matters; and that the copy of the letters of guardianship, to which the certificate is attached, is full, true, and complete, and that the original remains on file in the office of such clerk. It is argued that this certified copy of the guardian's appointment was incompetent evidence under section 414 of the Code of Civil Procedure, which provides that a judicial record of another state may be proved by the attestation of the clerk and the seal of the court, together with a certificate of a judge or presiding magistrate that the attestation is in due form of law. Whether this certified copy of the guardian's appointment was the best evidence, or competent evidence, was a question for the district court hearing the application for license to sell, in

which proceeding the evidence was offered. It was for that court to say whether it was satisfied with the evidence offered to prove that Philip Myers was the then appointed, acting and qualified guardian of the minor heirs of Henry B. Myers, deceased. That court accepted the testimony as sufficient to prove that fact, and its finding is conclusive unless appealed from. (*Menage v. Jones*, 40 Minn., 254.) The finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, because such court made such finding or rendered such judgment on incompetent evidence.

4. That the petition for license to sell the real estate was not verified by the guardian. The petition was verified by an attorney of the Douglas county bar, being the attorney and counsel who conducted the proceedings for the guardian. The failure of the guardian to verify his petition did not affect the jurisdiction of the district court of Douglas county, nor render its proceedings void. (*Hamiel v. Donnelly*, 75 Ia., 93; *Ellsworth v. Hall*, 48 Mich., 407; *Trumble v. Williams*, 18 Neb., 144.)

5. That no notice, either actual or constructive, of the application to sell was given to the wards. Section 49 of said chapter 23 provides: "A copy of such order [to show cause why the license prayed for should not be granted] shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or shall be published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order." The next of kin of these wards were Stephen B. Myers, an adult brother, and Susan B. Myers, their mother. These two filed their consent in writing in the district court of Douglas county to the proceeding instituted by the guardian and in such proceeding. This complied with the statutes quoted above so far as the next of kin are concerned. If any one else than this adult brother and his

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mother, other than the wards themselves, had any interest in the lot sought to be sold, the record makes no mention of it, nor is there any claim here that the guardian's deed is void because others than the wards interested in the real estate were not notified of the proceedings for its sale. So that we have this single question: In a proceeding by a guardian to sell his ward's real estate for the education and support of said ward, must notice of such application be served on said wards in order to give the district court jurisdiction of said proceeding? If such notice is required by the section of the statute above quoted, then the guardian's deed, under which McGavock claims, and all the proceedings leading up to and upon which it is based are void, for no such notice was given. Counsel for plaintiffs in error say "that the wards were persons interested in the real estate within the meaning of said section 49; that the application to sell is a proceeding, on its face, prejudicial to the wards, because, if the application is successful, its effect is to turn the real estate into money, which may be squandered before they become of age, and that, therefore, notice of the application for license to sell should have been served on the wards." It is true the wards are persons interested in the estate; but that an application by their legally appointed, qualified, and acting guardian for a license to sell such wards' real estate for the purpose of maintaining and educating them is, on its face, a proceeding prejudicial to such wards, or one in its nature adversary to them, cannot, we think, be successfully maintained. Had this been an application to sell the real estate of these wards for the purpose of paying debts, then, it seems, counsel's construction of the statute would be correct, for such proceeding would in its nature be an adversary one to such wards, and a sale made of their real estate for such purpose without the statutory notice to them of the time and place of the hearing of the application therefor would be void. (*Mickel v. Hicks*, 19 Kan., 578.) But the guardian's sale under consideration was not made to

pay debts. The petition filed for the license to sell the real estate in controversy here set forth facts, which, if true, showed that a sale of this real estate was for the advantage of these minors. The proceeding was instituted by their guardian for their benefit. It was on their application, in effect, that the license to sell their real estate was granted, and not in any proceeding against them. It is unfortunately true sometimes, through the lack of judgment or through the dishonesty of guardians or the failure to exercise vigilance on the part of courts, that minors are deprived of their property; but no legislature can enact a law, nor court lay down a rule of construction, that will always and in every case protect the orphan and secure him in his own. The statutes of the state require that courts having authority to appoint guardians shall see to it that the persons so appointed are capable and honest; that they give and keep good the bonds required by the statute for the faithful execution of their trust and render to the court at frequent intervals accounts of their guardianship. On the district court judges the law has conferred the exclusive power to say whether the facts exist which justify a sale of a ward's property by his guardian; to say whether the sale is a necessity to which the ward must submit; to say whether, in the judgment of the court, the sale asked to be authorized is for the best interests of the minor. This is a great discretion and a sacred trust confided to district judges by the law, and they are thus made the guardians of the orphans of the commonwealth. Their authority to authorize a guardian on his application to sell his ward's real estate was not meant to be exercised as a matter of course, but only after inquiry and investigation into all the facts and circumstances; and, not then unless the mind of the court is convinced that such sale is a necessity or is for the best interests of the ward. We shall not attempt a citation of all the cases, nor indeed many of them, for and against the

proposition that notice to a ward, of the application of his guardian for license to sell his real estate for the maintenance and education of such ward, is essential to the jurisdiction of the court to order the sale. The authorities are as conflicting as they are numerous; but we think that the weight of authority is that such proceeding is one *in rem*,—a proceeding on behalf of the ward and not adversary to him,—and that notice to such ward of such proceeding is not essential to the jurisdiction of the court to grant the license for the sale. In support of this view, see *Grignon's Lessee v. Astor*, 43 U. S., 318; *Mohr v. Manierre*, 101 U. S., 417; *Thaw v. Ritchie*, 136 U. S., 519; *Scarf v. Aldrich*, 32 Pac. Rep. [Cal.], 324; *Mohr v. Porter*, 51 Wis., 487, and authorities there collated. Opposed to this view are *Good v. Norley*, 28 Ia., 188; *Washburn v. Carmichael*, 32 Ia., 475; *Lyon v. Vanatta*, 35 Ia., 521; *Rankin v. Miller*, 43 Ia., 11. Indeed, it seems to be the settled rule of the supreme court of Iowa that in order to invest a court with jurisdiction to license a guardian to sell his ward's real estate that such ward must have notice of the application; and the rule has been consistently adhered to by that court. The rule in Mississippi appears to be the same as that in the state of Iowa. (*Hamilton v. Lockhart*, 41 Miss., 460; *Rule v. Broach*, 58 Miss., 522.)

Under a statute substantially like the one quoted above, and of which it is said that the Nebraska statute is a copy, the supreme court of Wisconsin at one time held that notice to the ward of an application by his guardian to sell his real estate was essential to confer jurisdiction on the court to grant the license. (*Mohr v. Tulip*, 40 Wis., 66); but the case was overruled by that court in *Mohr v. Porter*, 51 Wis., 487.

The decisions of the supreme court of Illinois are not uniform as to the rule as to whether notice to the ward of the application to sell his real estate is jurisdictional. In *Mason v. Wright*, 4 Scam. [Ill.], 127, it was said that the

proceeding by a guardian for a license to sell his real estate is not a proceeding adversary to the ward's interest, and that notice of such proceeding is not necessary to confer jurisdiction on the court to authorize the sale. This was in 1842. The same doctrine was announced by that court in *Mulford v. Beveridge*, 78 Ill., 455; but in 1877, in *Musgrave v. Conover*, 85 Ill., 374, that court held: "Where the record of a proceeding by a guardian for the sale of his ward's land fails to show any notice of the application to the wards, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally." Again, in 1887, in *Spring v. Kane*, 86 Ill., 580, that court said: "A proceeding by a guardian to sell his ward's land for his maintenance, being *in rem* and made on behalf of the owner, it is only necessary the court should have jurisdiction of the subject-matter to make an order to sustain a sale made thereunder."

The cases cited from the state of Illinois serve to show the bewildering conflict in the authorities on the subject under consideration.

Counsel for plaintiffs in error insist, somewhat strenuously, that this court should follow the rule laid down by the supreme court of Wisconsin in *Mohr v. Tulip*, *supra*, because they say that our statute was adopted from Wisconsin, and that in adopting the statute the legislature intended to adopt and did adopt the construction placed thereon by the supreme court of the state from which it was taken. We have already seen that the supreme court of Wisconsin has overruled *Mohr v. Tulip*, but there is still another thing in this connection. *Mohr v. Tulip* was decided in 1876, while our statute, which is said to be a copy of the Wisconsin statute construed in that case, was enacted by our legislature in 1866, or about ten years before the supreme court of Wisconsin put a construction upon it. The point made by counsel then is not tenable. The rule that when one state adopts the statute of another that

it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken has no application when such construction is not placed on the statute until after its adoption.

6. That no notice of the application to sell was served upon the heirs presumptive of the wards. The ingenious argument of the able counsel is thus stated by them in their brief: "Now, in this case, Henry B. Myers, Susan B. Myers, and Sarah E. Myers were minor children, brother and sisters, and each one was the heir presumptive of the other. Each one was therefore entitled to notice of the application to sell the other's property. The fact that the guardian made one application to sell the property of all said minors does not alter the case. If he had made application to sell the property of Harry B. Myers alone, he would have been obliged to notify Sarah E. and Susan B. Myers as heirs presumptive. The fact that he was seeking at the same time to sell their own property made his default greater instead of less. Now, even if the guardian does represent the ward for the purpose of selling his own property he does not represent him for the purpose of waiving notice of the application to sell his brother's property. In this view of it, Susan B. Myers and Sarah E. Myers, plaintiffs in error, say: 'In 1874 application was made in the district court of Douglas county, Nebraska, to sell our brother's property. We were his sisters, his heirs presumptive, interested in his estate, and we were entitled to notice of that application to sell. We received no such notice, and we claim that the sale as to us is void. Our brother has since died, and we have succeeded by inheritance to his property.'" This argument of counsel is based on their construction of section 109 of said chapter 23. The section is as follows: "All those who are next of kin and heirs apparent or presumptive of the ward shall be considered as interested in the estate, and may appear and answer to the petition of the guardian, and when per-

sonal notice of the time and place of hearing the petition is required to be given, they shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators contained in this subdivision." But the provisions of this section 109 are not applicable to a sale of the real estate of the ward by his guardian when such sale is made for the support and maintenance of the ward. The meaning of this section is that when any person other than the minor, such as an insane person, an idiot, a spendthrift, or a drunkard, shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs presumptive, that is, all such persons as would inherit such person's property should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them.

7. That no bond was given by the guardian to the district judge and approved by him. A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding, in which the license to sell the real estate of the wards was granted, does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was in fact presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of ob-

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taining the license to sell the real estate was not formally approved. (*Emery v. Vrooman*, 19 Wis., 724; *Pursley v. Hayes*, 22 Ia., 11; *Hamiel v. Donnelly*, 75 Ia., 93.)

8. That no sufficient notice of the sale was given. The guardian, in his report to the court of his proceedings under the license granted him to sell the real estate of his wards, stated that he gave due and public notice of the time and place of the sale by posting up in three of the most public places in Douglas county three notices of the time and place of the sale, and by publishing such notice in the *Omaha Weekly Herald*, a newspaper printed and in general circulation in said county for three weeks successively next before the date of said sale. There is no dispute but that the notice of the sale was published for three weeks in the newspaper as was stated in the guardian's return of his proceedings to the court. No copy, however, of the posted notices was found in the files of the records of the proceedings of the guardian's sale. The district court which granted the license to make the sale, in its order confirming the same, made a finding that the proceedings of the guardian in making the sale had been in all respects regular and in conformity to law. We think that it must be presumed, especially when this sale is attacked collaterally, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required and the guardian reported.

9. That the sale was not made by the guardian personally. We have not been cited to any authority or statute showing that a sale of real estate made by a guardian is void because the guardian did not personally attend or cry the sale. It certainly cannot be said that because the statute says that a guardian may file his petition and procure the order of a court under certain circumstances for the sale of his ward's real estate, that therefore the guardian must draw the petition and the other papers in such pro-

ceeding and attend to it personally and cannot do the same by an attorney; and we see no good reason why a guardian may not entrust the conduct of the sale of the real estate which he is making to his attorney or an auctioneer; and we are quite clear that this sale is not void because the attorney of the guardian actually made or cried the sale of the property.

10. That the description of the property sold was ambiguous and indefinite. The property sold by the guardian to McGavock is described in the guardian's report to the court as "the N. E. two-thirds ( $\frac{2}{3}$ ) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was not void for uncertainty. It was a sufficient description to enable the property to be identified. An examination of all the proceedings on which the deed is based, made by the guardian of the minor heirs of Henry B. Myers, deceased, to Alexander McGavock, leads us to the conclusion that such proceedings and deed were and are valid, and that the said minor heirs were, by said proceedings and deed, divested of all their title in and to the real estate conveyed by their guardian to McGavock. There is one feature, however, in McGavock's title that remains to be considered. Fanny B. Myers, the widow, and Stephen Myers, the adult son of Henry B. Myers, deceased, are plaintiffs in error here and were plaintiffs below. Have these parties any interest remaining in the real estate conveyed to McGavock by Philip S. Myers? This widow and son appeared in the proceeding instituted by the guardian to sell the real estate of his wards and consented that the district court of Douglas county should grant a license as prayed for by the guardian. This widow at that time had a dower interest in this land and the adult son was one of the owners. Does it follow that because this widow and adult son entered their appearance

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and consented to the proceedings instituted by the guardian of the minors to sell their real estate, the guardian, in making such sale, sold the interests of the widow and the adult son therein? We do not think that such a conclusion results. The guardian was not the guardian of the widow nor of the adult son, nor had he any authority to sell their interest in any real estate, nor did the district court of Douglas county have jurisdiction or authority to authorize him to sell their real estate. In fact, the guardian did not attempt to sell their real estate, but only the interests of his wards therein. The court did not authorize him, and could not authorize him, to sell anything more than the interest of his wards in the lot. The appearance entered and the consent given by the widow and adult son to the proceeding was to avoid the formality of serving a formal notice on them of the proceedings. Such appearance and consent made them parties to the proceeding, but it does not follow that because they were parties that such sale and conveyance of the minors' interest divested the interest of the adult son and the widow in the real estate sold by virtue of such proceeding. We do not say that in a proceeding by a guardian to sell the real estate of his minor wards the adult heirs might not make themselves parties to such proceeding and take such steps therein, by pleading, disclaimer, or otherwise, so that a sale and deed made in pursuance of such proceeding by the guardian would divest the interest of such adult heirs or other persons interested in the real estate; but we do say that this record does not disclose that the proceedings had by the guardian and the sale and deed of the real estate made by him pursuant to said proceedings were intended to, or did, divest the interest which the widow and adult son had in this real estate. This point is not argued, except perhaps incidentally, by counsel, but we have thought it but right that every point connected with the proceedings on which the title of the defendants in error depends

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should be considered to avoid possible future trouble and to set at rest the title of the real estate in question so far as the defendants in error are concerned. McGavock, as a defense to this action, pleaded and proved in the court below that he had been in the open, exclusive, notorious, and adverse possession of the premises purchased by him at the guardian's sale for more than ten years prior to the bringing of this action. During all this time he had occupied the premises under a claim of title thereto, and it does not appear that either the widow or the adult son ever paid any taxes on these premises during all this time, nor in any other manner asserted any claim of title or ownership thereto. Now, this widow and adult son, having voluntarily made themselves parties to this proceeding, were charged with notice of what was done therein. The court, by its order confirming the sale, directed the guardian to pay this widow a stated sum in lieu of her dower interest in the property, and to the adult son his distributive share, as heir, of the proceeds of the sale. This order was made by the court on the theory that McGavock had acquired by his purchase not only the interest of the minors in the real estate sold, but that of the widow and adult son as well. McGavock entered into possession of the real estate then, not as a co-tenant of the widow and adult son, but under a claim of title in himself to the whole property, and this entry of McGavock, and the proceedings on which his possession was based, all being with notice to the widow and adult son, operated as an ouster of the widow and adult son, and McGavock's possession from its incipiency was adverse. This adverse possession, then, of McGavock to this real estate had, at the time this suit was brought, vested in him whatever title the widow and adult son had previously had therein. It is by reason of this adverse possession and the statute of limitations, rather than by reason of the guardian's proceedings and sale of the land, that the interest therein of the adult son and widow has been divested.

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“One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same.” (*Parker v. Starr*, 21 Neb., 680.)

We next turn our attention to the consideration of the claim of title of the Union Pacific Railway Company to the portion of the property in controversy occupied by it. This corporation is in possession, claiming title to a portion of that part of the lot in controversy occupied by it by virtue of a conveyance from McGavock and his wife, under date of March 22, 1877. We have already seen that McGavock's title to this property was acquired by virtue of the guardian's deed and the proceedings on which the same was based. It is now argued by counsel for plaintiffs in error that the Union Pacific Railway Company was incompetent to take the title of this property by the conveyance from McGavock, and this contention is predicated on section 8, article 11, of the constitution of 1875, which is as follows: “No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state.” The Union Pacific Railway Company is, and was at that time, a corporation organized under the laws of the United States, and by reason of the constitutional provision just quoted was incompetent to take title to the real estate by the conveyance from McGavock; but this conveyance is not therefore void. It is, at most, voidable. Its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose. (NORVAL, J., in *Carlów v. Aultman*, 28 Neb., 672.) The Union Pacific Railway Company, because it took title to this property in violation of the constitution, did not thereby become

an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize any one to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title, or claim, as such, to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha, or an ordinary foreign railroad company. It would be a monstrous construction of this constitution to say that if A should, for a valuable consideration, convey his real estate to B, that because B was incompetent under the law to take such conveyance, that therefore the title should revert to A. It remains to be said, of the part of the property occupied by this corporation which it attempted to acquire from McGavock, that the incompetency of the corporation to take the title does not in any manner help the claims of the plaintiffs in error, the widow and adult son of Henry B. Myers, deceased, whose title, we have seen, to this part of the real estate was not divested by the guardian's sale. The statute of limitations began to run when McGavock entered under his guardian's deed, and his conveyance and surrender of possession of part of the premises to a grantee incompetent to take did not arrest the running of the statute. But the railway company, like McGavock, pleaded and proved that it had been in the open, notorious, exclusive, and adverse possession of this real estate, claiming title thereto, for more than ten years prior to the bringing of this suit. This adverse possession then vested the title to the real estate occupied by the railway company in it as against all persons except the state of Nebraska.

The right to the possession of the other portion of the real estate occupied by the railway company was acquired on the 12th day of May, 1871, in pursuance of a writing in words and figures as follows:

"Be it known that I, Philip Myers, of the city of Chicago, state of Illinois, as administrator of the estate of

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Henry B. Myers, deceased, late of the county of Mahaska, and state of Iowa, and also as agent of Stephen B. Myers, one of the children and heirs, and as guardian of the property of Harry B. Myers, Sarah E. Myers, and Susan B. Myers, remaining children and minor heirs at law of said Henry B. Myers, who died seized of lot number eight (8), in block two hundred and three (203), in the city of Omaha, Douglas county, have received from the Union Pacific Railway Company the sum of fifteen hundred dollars in the bonds of said city, in full payment and satisfaction of the damages accrued and awarded by reason of appropriation of a part of said lot eight (8), in block two hundred and three (203), in said city, by said Union Pacific Railway Company for depot grounds. \* \* \*

"Witness my hand at the city of Chicago, Illinois, this 12th day of May, A. D. 1871.

"PHILIP MYERS,

*"Administrator of the Estate and Agent and Guardian of Heirs, as the Friend of Henry B. Myers, deceased."*

Section 96 of chapter 16, Compiled Statutes, 1893, in force at the date of said writing quoted above, provides: "Whenever any railroad corporation shall take any real estate as aforesaid of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person or such married woman with the guardian of such husband may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate and may give valid releases and discharges therefor." The evidence shows that the Union Pacific Railway Company has been in possession of the real estate, using and occupying it for railroad purposes, since the date of said writing or receipt quoted above. The able counsel for plaintiffs in error say: "Said receipt does not purport to be a settlement under said section 96, but on its face shows that it is a mere receipt for the amount of an award which had pre-

viously been made in some other proceeding; that the language of the receipt indicates the railway company had in some proceeding appropriated the portion of the lot referred to for depot grounds and that an award of damages for such appropriation had been made in favor of the owners of said real estate; that the real source of title of the railway company to the property in question is the proceeding for the appropriation of said lot and not the receipt." We think the deductions made by counsel are reasonable and probably correct, but we do not see how that helps their clients' case. The argument, in brief, is that the Union Pacific Railway Company, some time prior to May, 1871, had instituted condemnation proceedings, and in pursuance thereof took possession of this real estate, and that the amount of money paid to Philip Myers as guardian was the amount awarded as damages to the minors by reason of the appropriation of such real estate by the railway company, and that as the railway company was a corporation created under the laws of the United States, or in other words, that it was not a domestic corporation, it had no power or authority to exercise the right of eminent domain in this state; and that section 96, quoted above, is only applicable to domestic corporations. This section is a part of the general railroad corporation act in force at the time that the railroad company appropriated the property in controversy. The constitution of 1866, in force at that time, did not prohibit foreign railroad companies from building or operating roads in this state; and, since foreign railroad corporations were not then prohibited by the constitution or the laws from building and operating their roads in this state, we do not know of any rule of law or comity which prevented their acquiring, by purchase or settlements made for damages, the right to occupy and use such real estate as they needed. It is no doubt true that it was competent, then and now, for the legislature to prohibit a foreign railroad company from exercis-

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ing the powers of eminent domain in this state, but in the absence of legislation and in the absence of any constitutional provision on the subject we cannot say that the appropriation of this property with the guardian's consent was wrongful or illegal. It is true that some sections of the act, of which said section 96 is a part, apply exclusively to domestic corporations, but we think that the provisions of that act, in so far as they are applicable, apply not only to railroad corporations organized under the laws of this state, but also to all railroad corporations operating roads in this state. Certainly it is true that the authority of the railway company to operate its road, and to acquire by contract with the owner the necessary real estate for that purpose, is a question which cannot be inquired into in an action of this character. But whether the railway corporation had the right to exercise the power of eminent domain and condemn the real estate in controversy is, under the evidence here, wholly immaterial, as the receipt affords evidence that if the railway company did appropriate this property by condemnation proceedings, it also acquired the right to the possession of it by means of a settlement made with the guardian of the minor heirs in pursuance of said section 96. It certainly cannot be questioned but that this railway corporation might have taken a deed of conveyance of this real estate for railroad purposes from Henry B. Myers, had he been living, and had it done so and entered into possession of the real estate his heirs would not be entitled to oust the railway company therefrom whether the corporation had the right to build and operate a road in this state at that time or not. We have been cited to no authority, and indeed the argument has not been advanced, that it is not competent for the legislature to provide that the legal guardian of minor heirs may make settlement with a railway corporation for damages to their real estate by reason of its occupancy by a railway company. Counsel say, however, that the act of congress under which the railway

company exists provides in what manner settlement shall be made with a minor when his real estate is taken for railway purposes, and that as the receipt is not in conformity with this provision of the act of congress that it is no protection to the railway company. There are several things to be said of this argument. It is competent for the United States government, for its own purposes, to exercise the powers of eminent domain in any state of this Union. If congress can delegate the power to exercise the right of eminent domain in the states to a corporation created by the laws of congress, which we by no means concede, then, in that case, such corporation, in the exercise of such power, would have to comply with the laws of the state where it exercised such power. The provision cited by counsel from the act of congress probably had reference to the exercise of the power of eminent domain by the railway company in the territories of the Union, and where land was appropriated, the possession of which was in the citizen, but the legal title to which was still in the United States government. It is also to be remembered that a railway corporation does not acquire the absolute fee-simple title to real estate purchased or condemned by it for railway purposes, but only an easement therein, subject to be divested by non-user or abandonment; hence the provisions in said section 96, which authorize guardians of minors, whose real estate has been appropriated for railway purposes, to give valid releases and discharges for the damages sustained by such minors. It remains to be said of this portion of the real estate under consideration that the widow and adult son of Henry B. Myers, deceased, at the time of the execution of the receipt to the railway company by the guardian, quitclaimed all their interest in said real estate to said railway company.

Aware of the grave importance of the questions involved in this record we have held this case for some time, it has been examined by the commissioners and the and

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judges, and the views expressed herein embody the unanimous opinion of the court. We have patiently and carefully considered all the points and arguments made by the counsel for the plaintiffs in error, and have reached the conclusion that the plaintiffs in error are not entitled to the possession of any of the real estate sued for herein, and that the learned district judge was entirely right in instructing the jury to find a verdict for the defendants in error. It follows that the judgment of the court below must be and the same is

AFFIRMED.

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**BELLEVUE IMPROVEMENT COMPANY ET AL., APPELLANTS, V. VILLAGE OF BELLEVUE ET AL., APPELLEES.**

FILED MARCH 22, 1894. No. 5502.

1. **Pleading: TRANSCRIPT: REVIEW.** Where an answer traverses certain allegations of a petition, not in direct language, but merely by reference to the numbers of the lines of the original petition where those allegations occur, and where the transcript filed in this court does not disclose the numbering of the lines upon the original petition, there having been a general finding for the defendants in the district court, this court will presume all the material allegations to have been put in issue by the answer.
2. **Taxes: INJUNCTION TO RESTRAIN.** A court of equity will not interfere to prevent the collection of taxes merely because the assessment was invalid. To obtain relief the plaintiff must bring himself within some recognized rule of equitable jurisprudence.
3. **Taxation: VALUE OF PROPERTY: OATH OF ASSESSOR: INJUNCTION.** Neither the fact that an assessment was not based upon the assessor's judgment as to the value of the property, nor that the assessor did not make or return an oath with the assessment roll, so vitiates the assessment as of itself to justify an

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injunction against the collection of a general tax founded upon such assessment. *South Platte Land Co. v. City of Crete*, 11 Neb., 344, and *Wood v. Helmer*, 10 Neb., 65, followed.

4. ———: MULTIPLICITY OF SUITS: INJUNCTION. In such a case the fact that plaintiffs were the owners of a large number of lots affected by the tax will not justify interference for the purpose of preventing multiplicity of suits or to remove a cloud cast upon the title, section 144 of the revenue act providing an adequate remedy at law.
5. **Local Assessments.** Where a village board undertakes to levy and collect a local assessment for the construction of sidewalks, without in fact constructing the sidewalks, before obtaining any proposals for their construction, and before in any manner ascertaining or estimating the cost of their construction, *held*, that such local assessment is absolutely void.
6. **Void Taxes: INJUNCTION.** Where a tax is void, that is, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144 of the revenue act. *Touzalin v. City of Omaha*, 25 Neb., 817, followed.

APPEAL from the district court of Sarpy county. Heard below before SCOTT, J.

The facts are stated in the opinion.

*Arthur C. Wakeley*, for appellants:

The assessment for the regular taxes is void because plaintiffs' lots, utterly regardless of their value, relative situation, or local condition, were, by the assessor, lumped together, and indiscriminately assessed at a valuation of ten dollars each. (*California & Oregon Land Co. v. Gowen*, 48 Fed. Rep., 771.)

The assessment is void because the assessor did not actually view the lots in controversy, as required by the provisions of section 52, chapter 77, Compiled Statutes. (*Marsh v. Board of Supervisors of Clark County*, 42 Wis., 502; *State v. Dodge County*, 20 Neb., 598.)

The assessment is void because not verified as required

by section 63, chapter 77, Compiled Statutes. (*Morrill v. Taylor*, 6 Neb., 236; *Lynam v. Anderson*, 9 Neb., 367; *Hallo v. Helmer*, 12 Neb., 87; *McNish v. Perrine*, 14 Neb., 582.)

The assessment is void because of the hostility of the deputy assessor to the improvement company. (Cooley, Taxation, ch. 24, p. 547.)

There can be no valid tax without a previous legal and valid assessment. It is not enough that there should be a mere formal assessment by some process. The rule by which the value is determined must be one that may lead to approximately correct results. If an arbitrary rule or process is resorted to for determining the value instead of the best judgment of the assessor, it is fatal to the validity of the assessment. (Cooley, Taxation, ch. 12, p. 258; Blackwell, Tax Titles [5th ed.], sec. 194; *City of Nebraska City v. Nebraska City Hydraulic Gas & Coke Co.*, 9 Neb., 339; *Lynam v. Anderson*, 9 Neb., 367; *South Platte Land Co. v. City of Orete*, 11 Neb., 344; *Hallo v. Helmer*, 12 Neb., 87; *McNish v. Perrine*, 14 Neb., 582; *Hersey v. Board of Supervisors of Barron County*, 37 Wis., 75; *Johnson v. City of Milwaukee*, 40 Wis., 315; *Marsh v. Board of Supervisors of Clark County*, 42 Wis., 502; *Plumer v. Board of Supervisors of Marathon County*, 46 Wis., 163; *Watkins v. Zwietusch*, 47 Wis., 513; *Graves v. Bruen*, 11 Ill., 431; *City of Chicago v. Burtice*, 24 Ill., 489; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 594; *McCreedy v. Sexton*, 29 Ia., 356; *State v. Cook*, 82 Mo., 185; *Woodman v. Auditor General*, 52 Mich., 28; *Perry County v. Selma, M. & M. R. Co.*, 58 Ala., 546; *McReynolds v. Longenberger*, 57 Pa. St., 13; *California & Oregon Land Co. v. Gowen*, 48 Fed. Rep., 771.)

That injunction is a proper remedy to remove or prevent a cloud upon title to real estate by the assessment of an illegal tax or the issuing of a tax certificate or tax deed based upon such illegal tax, creating a lien, real or appar-

ent, on real estate, is no longer doubted. (*South Platte Land Co. v. Buffalo County*, 7 Neb., 253; High, Injunctions, sec. 494; Blackwell, Tax Titles [5th ed.], sec. 1056; *Town of Ottawa v. Walker*, 21 Ill., 605; *Dunnovan v. Green*, 57 Ill., 63; *Olmstead v. Henry County*, 24 Ia., 33; *Louisville & N. R. Co. v. Warren County*, 5 Bush [Ky.], 243; *Palmer v. Rich*, 12 Mich., 414; *Scofield v. City of Lansing*, 17 Mich., 437; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 591; *Johnson v. Hahn*, 4 Neb., 139; *Crane v. City of Janesville*, 20 Wis., 305\*; *Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis., 57; *Marquette, H. & O. R. Co. v. City of Marquette*, 35 Mich., 504.)

The plaintiffs are entitled to an injunction, notwithstanding section 144 of the revenue law. (*Touzalin v. City of Omaha*, 25 Neb., 824; *Thatcher v. Adams County*, 19 Neb., 486.)

*John Q. Goss, contra:*

The assessor evidently adopted the suggestion of the board of assessors, as to the valuation of the lots in Bellevue, and made the value suggested by them his assessment, which, while irregular, does not render a tax levied thereunder void. (*Hull v. Kearney County*, 13 Neb., 539; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

The informality complained of as to the signing of the oath by the assessor does not affect the validity of the tax levy. (Comp. Stats., secs. 141, 142, ch. 77; *Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *McClure v. Warner*, 16 Neb., 447.)

The authority to levy special assessments for sidewalks is clearly vested in the boards of trustees of villages. The tax was not for an illegal or unauthorized purpose, and the action of the board will not be interfered with by injunction. (Comp. Stats., sec. 69, subd. 7, ch. 14; *Wilson v. City of Auburn*, 27 Neb., 435; 1 High, Injunctions, sec. 490.)

Injunction is not the proper remedy, and cannot be al-

lowed in cases of this character. (Comp. Stats., sec. 144, ch. 77; *Burlington & M. R. R. Co. v. Seward County*, 10 Neb., 211; *Wilson v. City of Auburn*, 27 Neb., 435; 1 High, Injunctions [2d ed.], secs. 485-488, 502, 503, 544, 545.)

A person deeming himself aggrieved by the assessment of his property has his remedy before the board of equalization. (Comp. Stats., sec. 70, ch. 77.)

From the decision of that board error lies to the district court, and the action of the board will not be reviewed in equity proceedings. (Code of Civil Procedure, sec. 580; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 30; *McGee v. State*, 32 Neb., 154.)

#### IRVINE, C.

This is an action to enjoin the collection of certain taxes. A temporary injunction was granted, but on final hearing dissolved and the action dismissed. The county clerk was made a defendant, and it was sought to enjoin him from transcribing and carrying out upon the assessment rolls the taxes complained of and delivering the tax list to the treasurer. The parties, pending the action, stipulated that this portion of the injunction should be vacated. This practically discharged the county clerk from the action, and the decree, so far as it affects him, must, in any view of the case, be affirmed.

The petition commenced by pleading a number of acts of the territorial legislature incorporating the city of Bellevue, and by pleading that in 1893 certain proceedings were had for the purpose of incorporating the same territory as the village of Bellevue under the general law. It is alleged that these later proceedings were void; that the alleged city of Bellevue remains in existence, and that there is no such municipality as the village of Bellevue. The answer upon this point denies certain of the allegations of the petition, but it does not traverse them in direct lan-

guage, but refers to them by the numbers of the lines upon which they appeared in the original petition. No motion was made to make the answer more specific. We have not the original petition before us, and cannot, therefore, ascertain what facts were put in issue. Upon appeal, the presumption is in favor of the correctness of the judgment, and we must resolve such doubts as arise as to the issues framed, in such manner as to support the judgment below, and therefore treat all these allegations as in issue. No evidence was introduced in their support. No argument is addressed to that portion of the case. Without deciding the question as to the validity of taxes sought to be imposed by a municipal corporation *de facto* and not *de jure*, we must presume the legal existence of the village of Bellevue.

The plaintiffs show that they are the owners of about 3,300 lots in that village and they complain of two classes of taxes sought to be imposed upon them. One of these classes consists of general taxes, attempted to be levied for municipal purposes. The other consists of local assessments levied for sidewalk purposes. These classes require separate treatment.

1. As to the general taxes, the petition contains many allegations to the effect that while the corporate limits are large, the actual village is very small, and that nearly all of plaintiffs' lots lie entirely outside of the village proper; that except upon paper they have no existence as lots; that no streets pass along them, and that they constitute an open, uncultivated area of land. There is some evidence in support of these allegations, but no right is claimed in argument by reason thereof, except indirectly as affecting the justice of the tax, and we shall therefore pass over these issues without further comment as to their legal effect. It is alleged that each of said lots, regardless of its value, has been by the assessor valued at \$10; that such valuation is greatly in excess of the true value of a portion of the lots,

and that the assessed valuation is enormously in excess of the valuation of other property similarly situated, and that an excessive valuation was placed upon plaintiffs' property because of an animosity toward the plaintiffs upon the part of the assessor. The petition further alleges that the assessment was not verified or sworn to according to law. Upon these averments the decision must rest. Some of them are established by the proof. As to others the evidence is uncertain or conflicting. The decree finds generally for the defendants, and this finding is supported by the evidence, in so far as it relates to the charges against the good faith of the assessor. It does, however, appear, without substantial contradiction, that the assessors for the different precincts of the county at their meeting determined arbitrarily that such lots should be uniformly assessed at \$10 each, and that the assessment was so made in the case of the plaintiffs' lots because of such resolution and without any exercise of judgment upon the part of the assessor or his deputy, without a view of the property, and wholly regardless of the actual value of the different lots. It also appears that the valuation placed upon these lots was greatly in excess of the assessed valuation upon much other property in the vicinity apparently of as great actual value. But this feature is not important, because the remedy for a disproportionate valuation would be before the board of equalization. It further appears that the assessment was made by a deputy and that the oath taken and returned therewith is in statutory form, and purports to be the oath of the assessor; but that it was signed and made not by the assessor but by his deputy.

Section 51 of the revenue law permits an assessor, under certain circumstances, to appoint deputies, but it provides that such deputies shall make their returns to the assessor. It is the assessor himself who is required to make the returns to the county clerk, and by section 63 of the revenue act, required to make oath thereto. Perhaps, where a dep-

uty acts, an oath should be made by the deputy, but this does not excuse the assessor from making oath, whether or not he has a deputy. It is his duty to make the return to the county clerk under oath, and an assessment roll returned by a deputy to the county clerk under the oath of the deputy and without any oath by the assessor does not satisfy the law. If an injunction can be granted against the enforcement of a tax based upon this assessment, it must be based upon the theory that the assessment was absolutely void because of the fact that it was not the result of the assessor's estimate of the value of the property and because there was no proper oath returned therewith. There is a marked distinction between the position of a taxpayer who, in proceedings at law, defends upon the ground of illegality of the tax, and that of one who comes into a court of equity seeking affirmative relief. In the former case the taxpayer may stand upon his legal rights and insist upon a more or less strict compliance with the requirements of law. In the latter he must bring himself within some recognized principle of equitable jurisdiction. (*Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.)

In *South Platte Land Co. v. City of Crete*, *supra*, the following language was used by LAKE, J.: "Instead of valuing the property according to his own judgment of its worth, the averment is that the city assessor adopted an assessment made by the precinct assessor, under the state law for general revenue purposes, returning to the city council a copy thereof as his own valuation. While the mode here adopted was not the one contemplated for fixing the value of property for the proposed levy, it was by no means void. In form, at least, it was correct, and, for aught that is shown, was entirely just and equitable to the plaintiff." It would seem that this case should be conclusive upon the one we are considering, in so far as relief is claimed upon the ground that the assessment proceeded

upon the basis of an arbitrary resolution of the county assessors and not upon the assessor's judgment of the value of the property. Nor will equity interfere to enjoin the collection of a tax for the reason that no oath was taken by the assessor or returned with the roll. (*Wood v. Helmer*, 10 Neb., 65; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

The writer was at first of the opinion that the fact that the plaintiffs were the owners of 3,300 lots affected by this tax afforded a basis for the interposition of a court of equity for the purpose of preventing multiplicity of suits. Section 144 of the revenue act undertakes to prohibit the courts from restraining the collection of any tax unless it be assessed for an illegal or unauthorized purpose, but provides for the payment of invalid taxes under protest and the recovery of the sums so paid by a method pointed out by the statutes. Without determining at this point whether this section is valid in its entire scope, it is safe to say that it provides an adequate remedy at law against taxes which are merely irregular and not absolutely void, and its validity to that extent has been several times tacitly recognized by the court. (*Thatcher v. Adams County*, 19 Neb., 485; *Caldwell v. City of Lincoln*, 19 Neb., 569; *Price v. Lancaster County*, 18 Neb., 199.) Such a proceeding, so far as practicable, would be governed by the general provisions of the Code of Civil Procedure, and we can see no reason why a claim for the refunding of such taxes upon all these lots should not be embraced in a single proceeding.

We have not overlooked the fact that the taxes here complained against are levied for village purposes and not for general, state, or county purposes. But we think that section 144 applies to such taxes. The authority for the levy of such taxes is found in section 82 of the act relating to cities of the second class and villages. It provides for the certification of the levy to the county clerk, for the entry by the county clerk of that levy upon the proper

tax list, and for the collection of the same in the manner provided for the collection of state and county taxes. The provisions of the revenue act are, therefore, applicable to village taxes, at least in so far as their enforcement is concerned. Section 144 of the revenue law in some of its parts refers expressly to village taxes, and it is clear that that section is applicable.

In many states courts of equity interfere to restrain the enforcement of invalid taxes upon real estate upon the ground that they cast a cloud upon plaintiff's title, but an inspection of the decisions of this court shows that this principle has not been here recognized. This feature has existed in each of the cases where relief has been refused upon the general ground that no established rule of equity jurisprudence has been invoked to sustain the suit. While if the writer were free to exercise his individual judgment he might reach a conclusion other than the one now expressed, he feels bound by the past adjudications of the court to declare that this tax is not absolutely void; that no ground has been shown for equitable interposition, and that section 144 of the revenue act provides the plaintiffs with an adequate remedy. Upon this branch of the case the judgment of the district court was right.

2. As to the local assessment for sidewalks the situation is as follows: On May 18, 1891, there was a special meeting of the village board to "make arrangements for certain sidewalks in the village of Bellevue, as per notice given." The following resolution was passed:

*"Resolved*, By the board of trustees of the village of Bellevue, Sarpy county, Nebraska, that there shall be a sidewalk laid upon the following streets and avenues of the said village of Bellevue, to-wit: [Here follows a designation of the places where sidewalks were to be built]; and be it further resolved by the board of trustees of Bellevue that the valuation of the lots abutting on and adjoining the sidewalks and the amounts to be charged against each said

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Bellevue Improvement Co. v. Village of Bellevue.

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lot for the construction of said sidewalks shall be and hereby is assessed and levied as follows:" Then follows a list of lots with a valuation and the amount of assessment opposite each description.

On July 15 an ordinance was passed providing that sidewalks at the places designated should be constructed, describing the manner of construction, requiring the clerk, on or before August 1, to notify, in writing, the owners of lots abutting on the sidewalks, requiring said sidewalks to be laid, and providing that such owners might, at their option, build sidewalks adjoining their lots on or before the 1st of September, and that to such owners as complied with that provision the village clerk should issue certificates showing that such sidewalks had been built and that such owners should be entitled to a credit upon the county tax list for the full amount charged for sidewalk purposes against said lot. The ordinance also provided further that after the 1st day of September the committee on streets and alleys should advertise for proposals for the construction of the sidewalks remaining then unbuilt and the proposals laid before the board of trustees for acceptance or rejection. The ordinance then provided in a general way for contracts based upon the bids so received. These are all the proceedings upon the subject.

This case was tried in March, 1892, at which time no sidewalks had been constructed. Section 69 of the act relating to cities of the second class and villages gives villages, in the fourth subdivision, the power to construct sidewalks and to levy a special tax on the lots of land fronting on "said highway" to pay the expense of said improvement. Subdivision 7 provides that the assessments for such purposes shall be made by the board of trustees by a resolution fixing the valuation of each lot assessed, taking into account the benefit derived or injury sustained in consequence of such contemplated improvement, and the amounts charged against the same. The principal objec-

tion urged by counsel against these assessments is that it does not appear that they were made in proportion to the special benefits conferred. It is clear from an inspection of the resolution that the assessment was not made in proportion to street frontage, and we are aware that some courts have held that where an estimate of benefits does not affirmatively appear, the question as to whether or not the assessment was based upon benefits is open to inquiry by the court. (*Chamberlain v. City of Cleveland*, 34 O. St., 551.) But we think the better rule to be that it should be presumed that such assessments are based upon the special benefits conferred and do not exceed such benefits. The record does not show that these lots would not be benefited by such an improvement to the full amount of the tax. The argument is made that because they are assessed at only \$10 each, while the assessment for sidewalks in many cases greatly exceeded this assessed valuation, said assessment must exceed the benefits conferred; but it is not impossible that a lot which, because of inaccessibility, was only worth \$10 should become worth many times that sum where, by the improvement of streets, it is rendered accessible. To our mind the serious feature of this local assessment lies in the fact that it was levied before any work was done, before any contract was made for the performance of the work, and before any estimate was made of the cost of the improvement. The authority of villages is only to defray the expense of the improvement by local assessment. There is required, as a basis for the assessment, at least some estimate made with reasonable certainty of that expense.

It is said in Cooley, Taxation [2d ed.], 665: "There is no reason in the nature of things why an assessment should not be made before the work is actually done and before the cost shall be finally and conclusively determined. \* \* A city must also, in order to be enabled to perform its agency to advantage, be allowed to make the assessment and even the collection, if it shall be deemed proper, in ad-

vance. It has been repeatedly held that this is admissible." Three cases are cited in support of that rule. Of these *Manice v. City of New York*, 8 N. Y., 120, holds, not that the assessment may be made before the work is done, but that the city might do the work at its own expense and make the assessment after the work was completed. *Henderson v. City of Baltimore*, 8 Md., 352, was under a very broad statute, and does hold that payment might be enforced before any portion of the work is commenced; but it appears from the statement of the case that a contract had been made prior to the assessment, so that the cost of the work was determined. *Scovill v. City of Cleveland*, 1 O. St., 126, holds that an assessment was not void because in excess of the actual cost, but that was under a statute requiring the appointment of a committee of freeholders, first, to estimate the cost of the improvement, and, second, to assess the expense thereof to the property benefited. Here a fair method of estimating the expense was provided, and it clearly appears from the opinion that the making of such an estimate must precede the assessment and is an essential prerequisite thereto.

In the case before us there was no estimate of the expense, but the assessment was made arbitrarily months before any steps were taken for ascertaining the expense. Moreover, at the time of trial the improvements had not been made. To permit a village board or city council to impose local assessments in this manner, without regard to the cost of the improvement and without in fact making the improvement, would be to permit a confiscation of property under the guise of an assessment for contemplated improvements which, if made, would benefit the property, but without a *bona fide* intention of making them. We think, therefore, that these assessments were absolutely void. The case in this feature is analogous in principle to that of *Touzalin v. City of Omaha*, 25 Neb., 817. In that case the court granted an injunction against the enforcement

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of a tax for grading a street upon the ground that the place graded had not been laid out as a street, and that plaintiff's property was not adjacent to or abutting upon the street graded, it being held in that case that a court of equity would enjoin the enforcement of a void tax, notwithstanding a section of the city charter substantially similar to section 144 of the revenue act. We think the assessment for sidewalks was absolutely void, there being a marked distinction between a tax for general purposes to which all property is equitably and legally bound to contribute, the plaintiff merely seeking relief because the forms required by law were not complied with, and a local assessment for the cost of improvements, where the only constitutional basis is benefits conferred, and the plaintiff asserts and proves that the cost was not considered and no benefits were conferred.

DECREE ACCORDINGLY.

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E. HURLBUT, JR., v. A. W. HALL.

FILED APRIL 3, 1894. No. 5327.

1. **Witnesses: CROSS-EXAMINATION.** Ordinarily, the cross-examination of a witness should be restricted to matters brought out on his examination in chief. If it is desired to examine the witness upon other matters, the cross-examining party must make the witness his own, and call him as such. *Boggs v. Thompson*, 13 Neb., 403, followed.
2. **Admission of Evidence: OBJECTIONS: REVIEW.** Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling; but where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge, as a ground of reversal, that the objection was not specific.

39	899
44	626
39	889
45	866
39	889
48	506

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Hurlbut v. Hall.

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3. ———: EXCEPTIONS: REVIEW. An exception must be taken to the ruling of a trial court on the admission or exclusion of testimony, in order to obtain a review of the question in this court.
4. Alteration of Instruments. Where a promissory note has been altered in a material part after its delivery to the payee, without the knowledge or consent of the maker, it is invalid, even in the hands of an innocent purchaser.
5. ———: MATERIAL ALTERATIONS. The insertion of the figures "10" in a promissory note, thereby making the instrument draw interest at ten per cent, when no rate of interest was originally specified, is a material alteration.
6. Instructions: HARMLESS ERROR: REVIEW. A judgment will not be reversed for the giving of an instruction not based upon the evidence, where it is clear that the party complaining of it could not have been prejudiced thereby.
7. ———. It is not error to refuse to give an instruction not applicable to the pleadings and evidence, although correct as an abstract proposition of law.

ERROR from the district court of Clay county. Tried below before MORRIS, J.

*Truman A. Barbour and Thomas H. Matters, for plaintiff in error.*

*J. L. Epperson & Sons, contra.*

NORVAL, C. J.

This is an action brought by the plaintiff in error upon a promissory note, a copy of which is set out in the petition as follows:

"\$120. HARVARD, NEB., August 31, 1888.

"On or before the 31st day of August, 1889, I promise to pay to the order of W. T. Magee one hundred and twenty dollars, value received, with interest at 10 per cent per annum.

A. W. HALL

"Payable at Clay County Fence Factory."

The note was indorsed as follows: "Pay without recourse.  
W. T. MAGEE."

The petition alleges the making and delivering of the note by the defendant to the payee therein named; that plaintiff is the owner and holder thereof, and that he purchased the same before maturity for a valuable consideration, and without notice of any equities in favor of the defendant.

The answer denies that the defendant executed and delivered the note declared upon, and that plaintiff purchased the same as averred in the petition, and alleges that the defendant executed a promissory note on the 31st day of August, 1888, for \$120, payable to the order of W. T. Magee, but that said note did not bear interest; that after the delivery of the note it was materially altered, without the knowledge or consent of the defendant, by inserting the figures "10," so as make the instrument draw ten per cent interest per annum. The answer further alleges, in substance, that the note so executed by the defendant was given to the said Magee in consideration of the defendant being appointed agent of the payee for the sale of a certain slat and wire fence, which Magee agreed to keep in stock at Clay Center, and to furnish to the defendant at 35, 40, 55, 60, and 65 cents per rod, according to the number of wires used; that Magee agreed to assist in the selling of said fence, so that the net profits to the defendant should be \$48 per mile, and that said Magee failed to perform his part of said agreement.

The allegations of the answer are denied by the reply.

Upon the issues thus formed, the cause was tried to a jury, who returned a verdict in favor of the defendant, upon which judgment was rendered by the court.

A number of rulings of the trial court on the admission of testimony are assigned as error, which we will notice in the order stated in the brief of counsel for plaintiff in error.

Upon the trial in the court below the plaintiff called, as a witness in his behalf, the defendant A. W. Hall, for the purpose of proving that the latter signed the note sued on;

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Hurlbut v. Hall.

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and it is insisted by counsel that the cross-examination of the witness exceeded the bounds of a proper examination. We quote from the bill of exceptions the entire testimony of the defendant :

Q. (Handing paper.) Did you ever see that paper before?

A. Yes.

Q. Is that your signature?

A. Yes.

Q. Did you write that letter to Mr. Hurlbut?

A. Yes, sir.

Said paper was marked Exhibit "A," and offered in evidence by the plaintiff, and read to the jury.

Q. (Handing paper.) Is that your signature?

A. I think it is; yes, sir.

Note offered in evidence by plaintiff, marked Exhibit "B."

Cross-examination by Mr. Epperson:

Q. Look at that note and state whether, or no, there has been any alteration made in it since you signed your name to it.

Objection by plaintiff, as incompetent, the note not being introduced in testimony at the present time, and that counsel has no right to cross-examine until the party calling the witness has examined in chief. Objection overruled.

Exhibit "B" offered in evidence by plaintiff. Note admitted. Plaintiff excepts.

Witness excused.

It is a familiar rule of evidence that ordinarily the cross-examination of a witness must be restricted to the matters brought out on his examination in chief. Where it is desired to examine the witness upon other matters, the cross-examining party must make the witness his own, and call him as such. (*Boggs v. Thompson*, 13 Neb., 403.) The plaintiff called the defendant to the stand for the single

purpose of having him identify his signature to the note, and while the testimony sought to be elicited on cross-examination by the question objected to tended to establish the defendant's plea that the instrument had been materially altered after the execution thereof, the question was not proper to be put to the witness on his cross-examination, since it did not relate to the facts testified to on his direct examination. The plaintiff, however, was not prejudiced by the overruling of his objection to the question, inasmuch as the record fails to show the witness answered the question. Counsel for plaintiffs in error in their brief say the defendant, after the overruling of the objection, then gave this answer to the question: "Yes, sir, the ten per cent has been inserted." This assertion is not sustained by the bill of exceptions. It is insisted "that the court then refused to admit the note and have it called a note, and would admit it only as a paper signed by the defendant, Mr. Hall." The record fails to sustain the contention, as it will be observed that the copy of the record above quoted shows that the note was admitted without any qualification whatever. It was received in evidence for all purposes. The bill of exceptions, on page 3, shows that the note a second time was admitted in evidence and was read to the jury, and must have been fully considered by them.

Complaint is made because the court sustained the defendant's objection to the following question propounded to the plaintiff's witness, T. A. Barbour, who was one of the attorneys who brought this suit in the court below: "Q. By what authority did you bring this suit in Mr. Hurlbut's name? Objection by defendant. Sustained." There was no error in this ruling, since the question was directed to a matter irrelevant to the issues in the case. The authority of Mr. Barbour to bring the suit was not raised by any pleading in the case, therefore it must be presumed that such authority existed. Again, the ruling complained of is not properly raised, for the reason the record fails to

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Hurlbut v. Hall.

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disclose that the plaintiff stated to the trial court what answer the witness would make to the question. That this was necessary, in order to have the ruling reviewed by this court, is too well settled to require the citation of the authorities in support thereof.

But it is urged that the court erred in sustaining the objection to the question last stated, because the ground of objection was not given at the time the ruling was made, and Thompson, Trials, sec. 693, and several other authorities to which our attention has been directed, sustain the doctrine contended for. Mr. Thompson, in his work to which reference has been made, at section 693 states the rule thus: "Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions. He waives all grounds not so specified." Had the objection to the question been overruled, the answer of the witness taken, and the defendant was seeking to have the ruling reversed, perhaps then the plaintiff would be in a position to invoke the above rule and insist that the objection was not sufficiently specific to present any question for review. But the doctrine stated by Mr. Thompson has no application where, as in the case at bar, the court sustains the objection to the question propounded. If the testimony was for any reason properly excluded, which was clearly the case, plaintiff has no just grounds for complaint of its exclusion. The ruling cannot be reviewed, for the obvious reason that no exception was taken at the time the testimony was excluded. (*Republican V. R. Co. v. Arnold*, 13 Neb., 485.)

Counsel for plaintiff in the brief say: "During the further examination of the same witness the following question was asked by the plaintiff's attorney: 'Q. Did

you ever have any talk with Mr. Hall about this matter before the note was due?' To which the defendant objected without giving any reason for his objection, and the court thereupon sustained the objection, to which the plaintiff then and there duly excepted." The question was asked, but no objection was made thereto by the defendant. The record also shows that the witness answered the interrogatory as follows: "I cannot say positively. I made a trip to Mr. Hall's place of residence before the note came due, and he was not at home. My remembrance is that some of his family were, and I left word that I (objection by defendant) had such a note; whether I had a personal interview (interrupted)." The witness, after the interruption, made no further response to the question. It was certainly incompetent to prove the conversation between the witness and a member of the defendant's family, in the absence of the defendant. The answer of the witness was objected to, but the court did not rule thereon, nor did the plaintiff take any exception, or further press the witness for an answer.

It is urged that the court erred in permitting the defendant to answer the following question put to him by his counsel while being examined as a witness in his own behalf: "State to the jury where you were and all the circumstances surrounding the signing of the note. State where you were, and what you were doing. State all the circumstances of your signing the note." The brief states: "To which the plaintiff there and then objected for the reason it was incompetent and immaterial, which objection the court overruled, to which ruling of the court the plaintiff there and then excepted." Here counsel again are mistaken. No objection to the question was made when the same was asked. The record shows that the objection was first made after the witness had answered the question. This was too late. Besides, the question was proper, and the answer pertinent and competent as tending to prove the defense set up in the pleading.

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Hurlbut v. Hall.

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Objection is urged to the court's permitting the defendant to testify that the note had been materially altered after the execution and delivery thereof, and in allowing the circumstances surrounding the signing of the note to be given, without it being first shown that the plaintiff was not an innocent purchaser of the note. The defendant was not required to prove that the plaintiff was not a *bona fide* holder of the instrument for value, in order to be entitled to introduce evidence tending to establish his defense that the note had been changed. The rule is that where a note is materially altered without the knowledge or consent of the maker, it is void even in the hands of an innocent purchaser. (*Brown v. Straw*, 6 Neb., 536; *State Savings Bank of St. Joseph v. Shaffer*, 9 Neb., 1.) The insertion of the figures "10" in the note, so as to make it draw ten per cent interest, was such an alteration as avoids the note. (*Davis v. Henry*, 13 Neb., 497.) We are unable to discover any error prejudicial to the rights of the plaintiff in the rulings of the court below on the taking of the testimony.

Exception was taken by plaintiff to the fourth paragraph of the court's charge, which reads as follows: "It is a general rule of law that possession of a promissory note, indorsed by the payee thereof in blank, is *prima facie* evidence of ownership, but if the indorsement be denied, then it is for the plaintiff to establish the fact of such indorsement by proof thereof." The foregoing instruction was not applicable either to the evidence or the issues raised by the pleadings in the case. No question was made but that plaintiff was the owner of the instrument declared on. Plaintiff could not have been prejudiced by the giving of the instruction, since the jury were told, in effect, by the seventh paragraph of the court's charge, that the plaintiff was entitled to recover the face of the note and interest, as by its terms expressed, unless they should find from the evidence that the note had been materially altered after the making of the same, as alleged by the defendant, without

the consent of the maker. The instruction complained of, although not applicable to the case, in view of the positive language of the seventh instruction given by the court on its own motion already referred to, could not have misled the jury. A judgment will not be disturbed for the giving of an improper instruction to the jury, where it is clear that the party complaining of it could not have been prejudiced thereby. (*Converse v. Meyer*, 14 Neb., 190; *O'Hara v. Wells*, 14 Neb., 403; *Labaree v. Klosterman*, 33 Neb., 150.)

Complaint is made of the refusal of the court to give to the jury the following instructions, requested by the plaintiff:

"1. The jury are instructed that the fact that the plaintiff is the holder of the note sued on is *prima facie* evidence he is the owner of the same, and that presumption exists until the contrary is shown by the defendant.

"2. The jury are instructed that negotiable paper before maturity is intended, to some extent at least, to represent money. Possession therefore is *prima facie* evidence of ownership when it is payable to bearer or indorsed in blank, and that presumption exists until the contrary is shown by the defendant.

"3. The jury are instructed that should they find from the evidence that the plaintiff was not the owner of the note, this would constitute no defense to the action and affords no protection to the defendant in this suit, his plea of no consideration having entirely failed.

"4. The court instructs the jury that the purchaser of negotiable paper for a valuable consideration before maturity, without notice of any defense in favor of the maker of the instrument, takes it free from all equities existing between the original parties, and it is incumbent on the defendant to first show bad faith on the part of the purchaser of the note in question before he can be allowed to introduce any testimony or interpose any defense as to the

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Hurlbut v. Hall.

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original transaction between the original parties to the note, which, in this case, the defendant has failed to do."

While it is true, as a proposition of law, that the possession by the plaintiff of a negotiable promissory note, duly indorsed by the payee thereof, is *prima facie* evidence of the holder's ownership, and that he received the same upon a valuable consideration before due, in the usual course of business, without notice of any equities between the maker and the payee, it was not reversible error to refuse to instruct the jury as requested by the plaintiff, inasmuch as the ownership of the note was not a controverted issue in the case. The only question submitted to the jury was whether or not the note had been materially altered after its execution. If the jury found that it had been so changed, then they were directed to find for the defendant, otherwise to return a verdict for the plaintiff. The fact that plaintiff was an innocent purchaser of the paper was no protection to him as against the defense of a material alteration.

It is finally insisted that the verdict is not sustained by the evidence. The defendant testified positively that "10" per cent had been inserted in the note after it was delivered, without the defendant's consent. The jury believed him, and we think the evidence fully justified them in so doing. The judgment is

**AFFIRMED.**

Post, J., not sitting.

STATE OF NEBRASKA, EX REL. JOHN H. HERSHEY,  
V. JOHN H. CLARK, COUNTY TREASURER.

39 809  
47 840  
48 491

FILED APRIL 3, 1894. No. 5977.

1. **Contract of Purchase of School Lands: DEFAULT IN PAYMENT OF INTEREST: FORFEITURE: NOTICE.** Before a contract of purchase of school lands entered into with the state can be declared forfeited, because of a default in the payment of annual interest, notice to the delinquent purchaser of such proposed cancellation must first be given by the commissioner of public lands and buildings.
2. ———: ———: ———: **NOTICE TO NON-RESIDENTS.** In case the purchaser is a resident of the state and his address is known, such notice must be personally served upon him; but where he is a non-resident, or his address is unknown, the notice may be published in some newspaper published or of general circulation in the county where the land is located.
3. *State v. Graham*, 21 Neb., 329, and *Richardson v. Doty*, 25 Neb., 420, distinguished.

ORIGINAL application for *mandamus*.

*Frank T. Ransom*, for relator, cited: *Richardson v. Pratt*, 20 Neb., 196; *Richardson v. Doty*, 25 Neb., 420.

*George T. French*, *Thomas Darnall*, and *Grimes & Wilcox*, contra, cited: *State v. Eberhardt*, 14 Neb., 203; *State v. Scott*, 17 Neb., 690; *People v. Martin*, 4 Neb., 54; *McGee v. State*, 32 Neb., 149; *State v. Graham*, 21 Neb., 354.

NORVAL, C. J.

On the 3d day of February, 1893, the relator, John H. Hershey, applied to this court for a peremptory writ of *mandamus* to compel the respondent, John H. Clark, as county treasurer of Lincoln county, to receive from the relator the amount of money due the state on a school land

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State v. Clark.

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contract of purchase for the southwest quarter of section 16, township 14, range 32 west of the 6th principal meridian, entered into by the state with one C. S. Guthrie, and by *mesne* assignments now owned by the relator, and to issue to him a receipt for said money. The issues were formed by proper pleadings, whereupon the cause was referred to Hon. J. H. Broady to take the testimony and report the same to the court, with his findings of fact and conclusions of law. Subsequently the referee made and returned to the court his findings, embracing eleven type-written pages, exclusive of the testimony upon which the same was based. The testimony and findings of facts of the referee may be summarized as follows:

On the 7th day of June, 1884, one C. S. Guthrie purchased of the state the land in controversy for the sum of \$1,120, he paying down one-tenth of the principal and the interest on the remainder up to January 1, 1885, amounting to \$30.78. By the terms of the contract he also agreed to pay the balance of the purchase price on June 7, 1904, with \$60.48 interest thereon on the first day of January of each year. On July 11, 1884, Guthrie, by written indorsement, bargained, sold, and assigned said contract and his interest in said land to Anna S. Guthrie, which assignment was entered of record in the office of the commissioner of public lands and buildings on June 22, 1885. On the 14th day of April, 1887, the said Annie S. Guthrie duly sold, assigned, and conveyed her interest in said contract, and the said land, to the relator, and on the 18th day of the same month said assignment was duly recorded in the office of the commissioner of public lands and buildings. Immediately upon receiving said assignment relator took actual possession of the land in dispute, and ever since has held actual, open, and notorious possession thereof under claim of right under said contract, and has actually resided with his family during said time within a mile of said land. The relator has paid to the state on said contract, as assignee thereof, all

payments up to January 1, 1891, but through inadvertence has made no payment thereon since then. The relator did not intend to abandon, but expected to comply with, said contract. On the 1st day of January, 1892, the commissioner of public lands and buildings prepared and sent to the respondent for service upon relator a written notice to the effect that the interest due on said contract was delinquent for more than a year, and, unless all payments due thereon were paid within six months from the date of the service of the notice, such contract would be declared forfeited. George E. Prosser, the respondent's deputy, usually had charge of the notices of this character, and said deputy was at that time, and for a long time prior thereto had been, well acquainted with the relator and knew that he was a resident of Lincoln county. The respondent, with slight diligence, could easily have ascertained the residence of relator, and made personal service of said notice upon him. No effort was made either to ascertain the residence of relator or to make personal service upon him, but the notice was returned to the commissioner of public lands and buildings without service and without statement of the residence of the relator unknown. Afterwards, in June, 1892, the said commissioner caused to be published in the *North Platte Telegraph*, a newspaper of general circulation in Lincoln county, for three successive weeks, a notice to the effect that the interest upon said contract was delinquent, and if said delinquency was not paid within ninety days said contract would be declared forfeited. The publication of said notice was the only notice given that the rights of the relator under said contract of sale would be forfeited. On the 14th day of September, 1892, the board of educational lands and funds, by resolution unanimously adopted, declared said contract canceled, and notice of said cancellation was given by the commissioner of public lands and buildings on October 15, 22, and 29, and November 5 and 12, 1892, in the said *North Platte Telegraph*. Said notice fur-

ther provided that if said contract is not reinstated by the payment of the delinquent interest, said lands would be offered for lease by the county treasurer on the 21st day of November, 1892. On the date last aforesaid a lease in proper form was executed and delivered to one Thomas Stimson for said land, who paid to the respondent \$1.87 to be applied as rental to January 1, 1893, and on January 23, 1893, said Stimson paid the further sum of \$8.43 to be applied as rental to July 1, 1893. At the time said Stimson leased the land he was aware, as he admitted on the trial, that relator claimed some interest in the land, but refrained from making any inquiry of him on the subject. The first notice or knowledge relator had of the said forfeiture of his contract, or the lease to Stimson, was January 27, 1893, and on the 31st day of said month relator tendered to defendant \$193.21 on said contract of sale, which was all that was due the state thereon, and he has kept said tender good.

The relator for fourteen years past has been a resident of Lincoln county, living within a mile of the land in dispute and near a station and post-office on the Union Pacific railroad named "Hershey," after the relator, and during the period covered by the transactions in the case at bar said Stimson has been a neighbor of and acquainted with the relator.

The question involved is the validity of the forfeiture of the contract. The contention of counsel for the relator is that the board of public lands and buildings had no jurisdiction or power to annul or cancel the contract issued to Guthrie, and assigned to plaintiff, inasmuch as no notice of the contemplated proceedings to declare a forfeiture of the contract was personally served upon the relator. If this position of counsel is well founded, then relator is entitled to the relief demanded. Section 16, chapter 80, Compiled Statutes, relating to the forfeiture of school land contracts, reads as follows: "If any lessee of educational

lands shall be in default of the semi-annual rental due the state for a period of six months, or any purchaser of educational lands be in default of the annual interest due the state for one year, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that, if such delinquency is not paid within six months from the date of the service of such notice, his lease or sale will be declared forfeited by the board of educational lands and funds. If after such notice the amounts due are not paid within six months from the date of the service of such notice thereof, the said contract of lease or sale may be declared forfeited; and the lands therein described shall revert to the state the same as though such lease or sale had never been made; and the order making such forfeiture shall be spread upon the records of the board of educational lands and funds. In case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated. The forfeiture may be entered by said board after ninety days from the date of such published notice. The provisions of this section shall apply alike to all the lands heretofore sold or leased, and to all lands hereafter sold or leased as educational lands of this state; *Provided*, The owner of any contract of sale or lease so forfeited may redeem the same by paying all the delinquencies and costs at any time before such land is again sold or leased." Under the statute just quoted no forfeiture of any contract of purchase of educational lands of the state can be declared because of the default of the purchaser in the payment of the annual interest due the state until notice to the delinquent purchaser of such proposed action has been given by the commissioner of public lands and buildings. Manifestly such is the import of the section. The giving of the notice is jurisdictional, and unless

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it is given in the manner pointed out by the legislature, the board of educational lands and funds is powerless to act. This is no new doctrine. In *Smith v. White*, 5 Neb., 407, this court, in discussing the power to cancel a contract of purchase of school land, under the statute then in force, said: "The payment of the purchase money is a condition precedent which must be fully performed on the part of the purchaser to entitle him to an estate in fee; but the mere failure of a purchaser to pay the interest at the time it became due will not of itself forfeit the estate of the purchaser in the land. The statute requires notice to be given by the county treasurer to the purchaser, stating the delinquency complained of, and requiring the removal thereof by the fulfillment of the conditions of the covenants of the bond and contract." The statute under review, in the case quoted from, differs from the one now in force, which is copied above, in that it required the county treasurer to give to the purchaser the notice of the delinquency, but how the notice should be given is not expressly provided, while the present statute directs that the commissioner of public lands and buildings shall give the notice, and provides how it shall be given. But this change in the statute does not modify the rule so as to permit a forfeiture without notice to the delinquent purchaser. True, a notice was given to the relator in the case at bar by publication in a newspaper; but such notice was insufficient to confer jurisdiction on the board to declare a forfeiture of the relator's contract. The statute declares that "in case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated." (Comp. Stats., sec. 16, ch. 80.) Notice by publication is only authorized where the owner of the contract is a non-resident of the state, or his address is unknown. In all other cases the statute contemplates that

personal service of the notice must be made upon the delinquent. Doubtless such service may be made in the manner required by law for the service of a summons in a civil action, or any other mode which will afford the delinquent personal notice of the proposed action. It is conceded in this case that no notice of the proposed action of the board of educational lands and funds was ever personally given Hershey, although he was a resident of the state and his address and residence were known. The conclusion is irresistible that the notice by publication is void, and the personal service of notice on the relator was necessary as a preliminary to confer jurisdiction to declare a forfeiture of the contract.

*State v. Graham*, 21 Neb., 329, does not conflict with the conclusion here reached. In that case the proof showed that the relator was duly notified of the default in the payment of the interest on his school land contract, prior to the time the same was declared forfeited by the state, and the resale of the lands. Besides, there the relator knowingly suffered, without objection, the second purchaser from the state to expend money in making valuable improvements on the land. The relator was therefore estopped to afterwards assert that he had any title or interest in the premises. Here there was no estoppel, nor did the relator have notice that his contract was about to be canceled or annulled.

The conclusion we have reached in the case at bar does not conflict with the decision of this court in *Richardson v. Doty*, 25 Neb., 420. In that case the purchaser under a school land contract had failed to pay the interest thereon due the state for fifteen years, and during ten years of which period the land had been in the actual possession of a subsequent, good-faith purchaser from the state, who made valuable improvements thereon in the belief that he held the title, the first purchaser permitting him to so do without objection. The court held that the first purchaser was

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barred, by his conduct, from asserting title against that of the second purchaser.

In the case we are considering Stimson had notice that the relator claimed the land, and therefore was not an innocent purchaser. As soon as the relator was apprised that his contract had been canceled by the state, and the land had been leased to Stimson, he tendered to the respondent the amount due on the contract, and brought this action to compel the defendant to receive the money thus tendered. The exceptions to the report of the referee are overruled, the report in all things is confirmed, and upon the relator depositing the amount of money heretofore tendered with the clerk of this court for the use of the county treasurer of Lincoln county, a writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

Post, J., not sitting.

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16. Testimony at a former trial is admissible where the witness who gave it is absent from the state. *Omaha Street R. Co. v. Elkins*..... 480

**Executors and Administrators. See ADMINISTRATION OF ESTATES.****Exemptions. See GARNISHMENT, 2-5. HOMESTEADS. TAXATION, 8.****Expert Evidence. See EVIDENCE, 1, 2, 12.****Factors and Brokers.**

An arrangement between a shipper of hogs and a commission firm, whereby the latter agreed to pay drafts drawn on them through the shipper's local bank for stock purchased by him to be shipped to said firm, does not constitute a trust relation, and the local bank is not liable to the commission firm for proceeds of such drafts which it has induced the shipper to pay to it in discharge of a debt due from him. *Hurlburt v. Palmer*.....158, 167-169

**False Representations. See FRAUD.**

Elements of actionable damage. *Upton v. Levy*.....334, 335

**Fees. See TAX LIENS.****Final Order.**

1. Sustaining demurrer is not. *Yager v. Lemp*..... 95
2. Nor is order denying motion to docket counter-claim as a separate cause of action. *Id.*

**Findings. See FRAUDULENT CONVEYANCES, 3.**

**Fines.** See CRIMINAL LAW, 4.

**Fixtures.**

1. Tenant's right to remove trade fixtures must be exercised while in possession under his lease. *Free v. Stuart* ...225-227
2. Chattel mortgagee of tenant has no greater rights than tenant; hence cannot remove mortgaged fixture after tenant has quit possession, though his implied tenancy from year to year as a result of holding over has not expired, and though mortgage was executed while original lease was still in force. *Id.*.....227, 228

**Foreclosure.** See MORTGAGES, 1, 2.

1. Statutory provision for deduction of prior liens is for plaintiff's benefit only; failure to observe it cannot be urged by defendant as an objection to confirmation. *Smith v. Foxworthy*..... 215
2. Newspaper in which notice is published need not be one of general circulation in any city or particular part of county. *Id.*..... 216
3. It is no ground of objection to confirmation that plaintiff proceeded with all legal dispatch to execute the decree, or failed to notify defendant of issuance of order of sale, or that excessive costs were taxed. *Id.*.....216, 217
4. On an appeal taken before sale from a decree, no deficiency having been ascertained, defendants cannot be declared liable for a deficiency judgment. *Reynolds v. Dietz*...187, 188
5. Complete record in, must be made unless waived for all parties. *Johnson v. Rawls*..... 352

**Foreign Corporations.** See ADVERSE POSSESSION, 2. GARNISHMENT, 5. RAILROADS, 1.

**Forfeiture.** See SCHOOL LANDS.

**Former Trial.** See EVIDENCE, 16.

**Fraternalities.** See SOCIETIES AND CLUBS.

**Fraud.** See FRAUDULENT CONVEYANCES.

1. Statements of vendor of land as to its value are generally mere expressions of opinion and not ground of rescission. *Nostrum v. Halliday*..... 828  
*McKnight v. Thompson*..... 752
2. But misrepresentations as to the value of real estate are sufficient ground for setting aside a trade for property in another state than that where the parties reside, and the vendee is prevented by the fraud of the vendor from making inquiries. *Id.*

**Fraud—concluded.**

3. A party is not estopped because of carelessness to deny liability on a writing which he has signed, if it was fraudulently altered before he signed it. *Ward v. Spells*.....812-815

**Fraudulent Conveyances. See CHATTEL MORTGAGES.**

1. *Landauer v. Mack* ..... 8
2. To make a sale fraudulent, purchaser must have notice of facts which would put one of ordinary prudence on inquiry. *Edwards v. Reid*.....648, 649
3. A decree annulling a conveyance to a party as fraudulent cannot be entered without a finding against such party. *Id.*.....649, 650
4. Retention and sale of chattels in usual course of business by mortgagor will not *per se* render void the mortgage; whether it is fraudulent is a question of fact. *Sherwin v. Gaghagen*. ....249-251
5. Nor is a mortgage given for the purchase price of the property mortgaged void because value of property is greatly in excess of amount of debt. *Id.*.....251, 252
6. Fraud in a chattel mortgage by reason of stipulation for possession and sale by mortgagor is available only to creditors who have levied before delivery to mortgagee. *Id.*... 250

**Garnishment.**

1. *Prentice Brownstone Co. v. King* ..... 816
2. The act of 1889, p. 369, for the better protection of laborers' wages, does not contravene the state constitution as class legislation, nor as being broader than its title, nor as imposing a penalty for the benefit of an individual. *Singer Mfg. Co. v. Fleming* .....682-686, 692
3. Nor does it contravene sec. 1, art. 4, of the federal constitution relating to the faith and credit to be given to judicial proceedings of other states. *Id.*.....686-690
4. Whether that portion of the act which makes its violation a crime is valid is not decided. *Id.*.....679-685
5. The act applies to a foreign corporation having a place of business in Nebraska which, by virtue of a contract made and performable here, institutes proceedings in another state and seizes wages earned and payable in Nebraska and exempt by its laws. *Id.*.....690-692

**General Denial. See PLEADING, 7.****Guaranty. See SURETYSHIP AND GUARANTY, 6.**

**Guardian and Ward.**

1. Guardian has no capacity to sue for debt due deceased ward. *Barrett v. Provincher*..... 773
2. Numerous objections to validity of sale of ward's real estate in pursuance of license by district court examined, and held insufficient in a collateral proceeding. *Myers v. McGavock*.....855-869
3. Application by guardian for such license is a proceeding *in rem* and requires no notice to the wards, or wards presumptive, where the purpose of the sale is their education and maintenance, not the payment of debts. *Id.*.....859-865
4. Natural guardians may become legal guardians and be licensed to sell ward's real estate only by appointment under the statute. *Id.*.....856, 857
5. Duties of district judges in supervising guardians and authorizing such sales. *Id.*.....861, 862
6. Purchaser at such sale may acquire title by adverse possession against ward's mother and adult brother who have appeared and consented to the sale. *Id.*.....868-870

**Handwriting.**

- A witness may testify to the signature of one whom he has never seen write, if he has sent to, and received in reply letters, the replies coming apparently from such person.
- Violet v. Rose*.....672, 673

**Harmless Error.**

1. Improper instruction not grounds for reversal unless prejudicial. *Hurlbut v. Hall*.....896, 897
2. An instruction defective, but not prejudicial, is not ground for reversal. *Roggencamp v. Hargreaves*..... 544
3. An instruction, though erroneous, is, where the verdict is supported by other evidence admissible regardless of such instruction. *Omaha & R. V. R. Co. v. Brady*..... 42
4. Submission incidentally by an instruction, of a matter not in issue, is, where jury could not have been misled thereby. *Violet v. Rose*.....669, 670
5. Error cannot be predicated upon a charge similar to one requested by the complaining party. *Richards v. Borowsky*, 774

**Hermeneutics. See CONTRACTS, 1, 5. STATUTES.**

**Homesteads.**

1. Conveyance of, must be signed and acknowledged by both husband and wife. *Violet v. Rose*..... 661

**Homesteads—concluded.**

2. To constitute abandonment of, there must be both actual removal and the intention not to return. Absence, though prolonged, for some temporary purpose is not abandonment. *Edwards v. Reid* .....651, 652
3. Extent of, is measured by claimant's interest in the land and not the fee-simple value thereof; hence judgments rendered after the execution of a mortgage which, when deducted, leaves claimant's interest less than \$2,000 are not liens on the property. *Hoy v. Anderson*.....338-390

**Husband and Wife.** See HOMESTEADS, 1.

**Imprisonment.** See CRIMINAL LAW.

**Indorsement.** See NEGOTIABLE INSTRUMENTS, 2, 3.

**Infants.** See GUARDIAN AND WARD.

**Injunction.** See TAXATION, 4-6. WASTE.

**Instructions.** See HARMLESS ERROR. NEGLIGENCE, 3. REVIEW, 2.

1. Use of phrase "considerable length of time" instead of "reasonable time" held error. *City of Lincoln v. Calvert*,  
312, 313
2. Use of expressions "slight negligence," etc., criticised. *Omaha Street R. Co. v. Craig* .....601, 618
3. Should be given by the court on the law of the case whether requested by counsel or not. *York Park Building Association v. Barnes* ..... 836
4. Failure of court to charge on a material issue is reversible error. *Waldorf v. Haggis*..... 735
5. Submission to the jury of issues upon which the evidence is uncontradicted is prejudicial where it withdraws attention from the real issues. *Dayton v. City of Lincoln*.....81, 82
6. When already given in substance, or inapplicable to the evidence, are properly refused. *Omaha Nat. Bank v. Thompson* .....274, 275  
*Jonasen v. Kennedy* ..... 313  
*American Building & Loan Association v. Mordock* ..... 420  
*Hurlbut v. Hall* ..... 890

**Insurance.**

*Phenix Ins. Co. v. Bachelder*..... 95

**Interest.** See USURY.

**Interpretation.** See CONTRACTS, 1, 5. STATUTES.

**Interstate Commerce.** See CONSTITUTIONAL LAW, 1.

**Joinder.** See PARTIES. PLEADING, 2, 3.

**Judgments.** See HOMESTEADS, 3. PARTNERSHIP, 3.

1. On pleadings held to be erroneous. *Mollyneaux v. Wittenberg*..... 547
2. When rendered against a party who is described and summoned by using his initial and surname, are void unless there is actual personal service; and he may interpose that fact as a defense, in a proceeding to revive the judgment. *Enewold v. Olsen*.....63-65
3. Become dormant in five years, unless execution is issued, and thereby lose priority over mortgages attaching during the continuance of the judgment lien. *Flagg v. Flagg*, 232-237
4. Neither the commencement nor the pendency of an action by the judgment creditor to subject defendant's real estate to the payment of a judgment will prevent it from becoming dormant or preserve its priority over a mortgage attaching within the period of the judgment lien. *Id.*

**Judicial Sales.** See FORECLOSURE, 1-3. GUARDIAN AND WARD, 2-6. TAX SALES.

1. Administrator's sale of real estate is. *Maul v. Hellman*... 328
2. Purchaser at such sale becomes a party to the proceeding and may be compelled to perform his bid; and it is no ground for release that the administrator refuses to perform an alleged agreement to apply proceeds of sale to discharge of incumbrances on property, especially where purchaser failed to object at confirmation, and order of court had directed sale subject to incumbrances. *Id*...329, 330
3. Purchaser at sale to enforce a lien takes free from it, but cannot tack lienor's prior possession to his own so as to establish title adverse to another. *Carson v. Dundas*....503-507

**Jurat.** See MECHANICS' LIENS, 8.

**Jurisdiction.** See COUNTY COURT. MUNICIPAL CORPORATIONS, 4. NAMES, 2.

1. Objections to, not appearing on the face of the record, may be raised by answer which contains also a defense to the merits, and in such case the latter does not constitute a general appearance or waive the jurisdictional defense. *Hurlburt v. Palmer*.....169-179
2. An alleged abuse of criminal process by which one defendant is brought into a county in order to serve him with summons there, and thus obtain jurisdiction over his co-defendants, is a defense which may be so raised. *Id.*

**Jurisdiction—concluded.**

3. Jurisdictional defects are not waived by prosecuting error or appeal. *Id.*.....179, 180
4. Nebraska courts will not generally, of their own motion, deny equitable relief on the ground that there is an adequate remedy at law; objection must be made on that ground, and the court's attention called to it before submission of the cause or it will be waived. *Sherwin v. Gaghagen*.....248, 249

**Juror<sup>s</sup>. See TRIAL, 4.**

One who admits that his acquaintance with one of the parties would interfere with his judgment is incompetent. *Omaha Street R. Co. v. Craig*.....625, 626

**Justice of the Peace.**

Cannot sign bill of exceptions in case tried before him without a jury, nor can evidence taken in such case be reviewed on error in district court. *Real v. Honey*..... 520

**Laborers. See GARNISHMENT, 2-5.****Landlord and Tenant. See FIXTURES. LEASE.****Lease. See FIXTURES.**

Agreement for, to extend one year, and under which possession is taken, if reduced to writing, though not signed by lessor, and though rent payments are monthly, is valid as a parol lease for one year. *Nickolls v. Barnes*..... 108

**Legislature. See EVIDENCE, 11.****Libel. See BLACK-LISTING.****Licenses. See GUARDIAN AND WARD, 2, 3. LIQUORS.****Liens. See JUDGMENTS, 3, 4. JUDICIAL SALES, 3. MECHANICS' LIENS. STATUTE OF FRAUDS, 2.****Limitation of Actions. See USURY, 6.**

Statute does not begin to run in favor of defendant in action to quiet title, until he asserts ownership. *Pleasant's v. Blodgett* ..... 744

**Liquors.**

1. Legislature, in exercise of police power, may prohibit sale of. *Hunzinger v. State*..... 653
2. It is no defense to an indictment for selling without license that no license could be procured. *Id.*..... 658
3. The first proviso to sec. 1, ch. 50, Comp. Stats., is not unconstitutional because residents within two miles of cities and villages are deprived of the privilege of having the sale of liquors licensed within such limits. *Id.*.....657, 658

**Liquors—concluded.**

4. Nor is the next proviso class or special legislation as assuming to "regulate county and township offices;" nor because there is but one county to which it may apply.  
*Id.*.....654-657

**Loans. See AGENCY, 2. USURY.**

1. *Hurlburt v. Palmer* .....167-169
2. *State v. Bartley*.....364-367
3. *American Building & Loan Association v. Mordock*..... 413

**Local Assessments. See TAXATION, 5.**

**Locus. See ACTIONS.**

**Lost Instruments. See DEEDS.**

**Maintenance. See CHAMPERTY.**

**Malicious Prosecution.**

1. Instruction defining "probable cause" approved. *Jonasen v. Kennedy*.....319, 320
2. Reliance upon advice of counsel as a defense must be proved by showing facts constituting a full disclosure to such counsel and action upon his advice in good faith.  
*Id.*.....313, 317
3. Mere suspicion or belief that a ring lost by theft is the same as one found in another's possession is not probable cause for prosecuting latter. *Id.*.....317, 318

**Mandamus. See SCHOOL ORDERS.**

- Relator's right and respondent's duty must be clear. *State v. Sabin* ..... 573

**Marshalling Assets.**

- Resort to one of two funds, for benefit of another creditor entitled to but one, will not be compelled to the prejudice of creditor entitled to double fund. *Farmers & Merchants Bank of York v. Anthony* ..... 351

**Maxims. See CAVEAT EMPTOR.**

**Measure of Damages. See DAMAGES.**

**Mechanics' Liens. See SURETYSHIP AND GUARANTY, 5.**

1. Rule of *caveat emptor* applies to those claiming benefits of, and they are charged with notice of interest of parties with whom they contract. *Hoagland v. Lowe* .....407-413
2. An agreement between a vendor and vendee that the former would make certain improvements on the premises, will not subordinate a mortgage for the purchase money to a lien for labor and material furnished for such improvements. *Id.*

**Mechanics' Liens—continued.**

3. Nor is such mortgage subordinated to the lien by the mere fact that it is made subject to another mortgage given by the vendee to obtain a loan for the purpose of making such improvements, the proceeds being in part used instead as a cash payment on the purchase price, and received by the vendee without knowing whence it was obtained. *Id.*
4. Mortgagee is not an "owner" within the meaning of the statute, and his interest will not generally be subordinated to liens for labor and material furnished after recording of mortgage. *Id.*
5. Do not attach by virtue of a contract with a proposed vendee of real estate who has received no conveyance and refuses to complete his purchase by payment. *Burlington v. Warner* .....493-499, 500
6. The vendor is not estopped from asserting his title against those claiming such liens, because he visits the premises and complains of the manner in which some of the work is being performed. *Id.*.....500, 501
7. Such lien claimants have no equity by which they can require the conveyance to be executed and money to be advanced on a mortgage, which had been taken by a loan company, and released. *Id.*.....493, 502
8. Affidavit for, whose jurat shows the venue to have been a county different from that for which the notary was appointed, is insufficient to perfect the lien and renders it incompetent in evidence. *Byrd v. Cockran* .....117-120
9. In suit to foreclose lien upon one piece of property for labor and materials furnished for it jointly with other property it must be shown definitely and not by mere approximation that the amount charged against the one property is the value of labor and materials used thereon. *Id.*.....122, 123
10. A joint lien will attach to several pieces of property for material delivered there under single contract. *Wakefield v. Latey*.....291, 292
11. Affidavit attached to account of items is not defective because it fails to state name of real estate owner, or of party with whom contract for furnishing materials was made; especially where the account itself discloses contractee's name. *Id.*.....288-290
12. *Semble*, That under a contract for material to be used in "dwellings" lien attaches if it is used in outhouses. *Id.*, 291

**Mechanics' Liens—concluded.**

13. Sufficiency of "account of items" is a question of law, and such account cannot be used to prove statutory requirements except oath and filing. Performance of other requirements is a mixed question of law and fact. *Id.*...289, 290

**Monopolies. See TRUSTS.**

**Mortgages. See CHATTEL MORTGAGES. FORECLOSURE. HOMESTEADS, 3. JUDGMENTS, 3, 4.**

1. An agreement to assume a mortgage as a part of the consideration for a conveyance, is an independent undertaking, whose existence is a question of fact upon which the finding of a trial court will not be disturbed where the evidence is conflicting. *Reynolds v. Dietz*.....185-188
2. An averment that a deed to a trustee, in whose name a conveyance was taken, recited that he had assumed a mortgage, does not warrant the conclusion that the *cestuis que trustent* are liable for a deficiency judgment. *Id.*
3. Create only a lien and do not convey title; mortgagee is not owner within meaning of mechanics' lien statute, and his interest will not generally be subordinated to lien for labor and materials furnished after recording of mortgage. *Horgland v. Lowe*.....407-413

**Motions. See PLEADING, 5, 9. TRIAL, 3.**

**Municipal Corporations. See NEGLIGENCE, 5, 6. TAX SALES. TAXATION, 1-5, 7.**

1. Damages to property from grading streets; "special," "general," and "common" benefits discussed. *Kirkendall v. City of Omaha*..... 6-8
2. "Special" but not "general" benefits are to be deducted in awarding compensation for such damages, and an instruction which fails to exclude a deduction for "general" benefits is erroneous. *Dayton v. City of Lincoln* .....82, 83
3. "Special benefits" are none the less such because they accrue as well to adjacent property. *Kirkendall v. City of Omaha*..... 8
4. Sec. 36 of act relating to cities of first-class (sec. 2518, Cons. Stats.) does not provide for judicial action by the council upon claims for unliquidated damages; such claims may be prosecuted in the courts. *Dayton v. City of Lincoln*.....77-79
5. Ordinary liability of, for unsafe streets, is suspended as to conditions which are reasonably necessary, and for a reasonable time, during repairs and improvements; but they

**Municipal Corporations—concluded.**

- must still exercise reasonable care. *City of Lincoln v. Calvert*..... 309
6. Are chargeable with notice of defects caused by their direct orders. *Id.*
7. Or of which they should have known. *City of Friend v. Ingersoll*..... 722

**Names. See SURETYSHIP AND GUARANTY, 6.**

1. Where a party is designated in pleadings and process by his initials, court should permit an amendment and not dismiss. *Real v. Honey*..... 516
2. A party's full legal name consists of his Christian or given, and his surname or partronymic; and except in cases mentioned in sec. 23 of the Code, unless both names are stated in the summons in full, there must be actual personal service on defendant in order to confer jurisdiction. *Enewold v. Olsen* .....63, 64

**National Banks. See USURY, 5, 6.****Negligence. See CONTRIBUTORY NEGLIGENCE. EVIDENCE, 4. MUNICIPAL CORPORATIONS, 5-7. QUESTIONS OF FACT, 3, 4.**

1. Defined. *Omaha Street R. Co. v. Craig* .....602-616
2. Question of, is for the jury, where reasonable men may fairly differ on the effect of the evidence; hence whether a street car passenger is negligent in alighting from a moving car, and not grasping the braces, is for the jury, and its finding will not be disregarded because it is contrary to the testimony of a majority of the witnesses. *Id.*, 602
3. The expressions "slight negligence," "slight want of ordinary care," etc., should not be used in instructions. *Id.*.....601, 618
4. Jumping from a moving train is. *Woolsey v. Chicago, B. & Q. R. Co.*.....801-803  
*Chicago, B. & Q. R. Co. v. Landauer*..... 803
5. The statutory right of railroads to lay tracks on streets, carries with it the duty to maintain grade crossings there; and failure so to do is evidence of negligence rendering the company liable. *Omaha & B. V. R. Co. v. Brady*....27, 36-38
6. In the absence of a municipal ordinance requiring the company to keep a flagman at such crossing, whether its failure to do so is negligence is a question of fact. *Id.*.....38, 39
7. Unnecessary noise from the escape of steam is not *per se*

**Negligence—concluded.**

- evidence of negligence. The surrounding circumstances must show neglect. *Id.*.....39-42  
*Omaha & R. V. R. Co. v. Clarke*..... 65
8. Negligence and contributory negligence are questions of fact where different minds might reasonably draw different conclusions. *Omaha & R. V. R. Co. v. Brady*...42, 43, 52, 53
9. Remittitur of \$5,000 ordered from judgment for \$7,000, for permanent injury not shown by competent evidence to be the actual result of the negligence complained of. *Id.* .....53-58
10. A champertous agreement between plaintiff and his counsel is not available as a defense in an action against a railroad company for damages. *Id.*..... 50

**Negotiable Instruments. See BANKS AND BANKING.**

1. Note given for privilege of using article not shown to be patented, but apparently open to use by all, is *nudum pactum*. *Schroeder v. Nielson*..... 338
2. Where maker, in action by indorsee, denies latter's ownership, indorsee must prove that note was indorsed by payee. *Id.* ..... 339
3. In an action by the indorsee of a note, where the defendant pleads fraud and failure of consideration, it is not error to permit defendant to testify as to transactions between the original parties, before showing that plaintiff was not a *bona fide* purchaser. *Violet v. Rose*.....665-668
4. A note showing on its face alteration in rate of interest should not be received in evidence until such alteration is explained. *Courcamp v. Weber* ..... 538
5. Insertion of figures "10" expressing rate of interest where none was provided for previously is a material alteration and avoids a note even in the hands of an innocent purchaser. *Hurlbut v. Hall*..... 896

**New Trial.**

Evidence not produced at the trial because its existence is forgotten will not justify a new trial on ground of newly discovered evidence. *Upton v. Levy*.....333, 334

**Notary Public.**

Can act only in the county for which he is commissioned, and claim for lien sworn to before him in another county is invalid. *Byrd v. Cochran* .....117-119

**Notes and Bills. See NEGOTIABLE INSTRUMENTS.**

**Notice.** See ADMINISTRATION OF ESTATES, 2. CHATTEL MORTGAGES, 2. FORECLOSURE, 1-3. GUARDIAN AND WARD, 3. MUNICIPAL CORPORATIONS, 6, 7. SCHOOL LANDS. VENDOR AND VENDEE.

Permission to file supplemental pleading without, is not reversible error where adverse party is in court room when application is made and allowed and fails to object on that ground. *Flagg v. Flagg*..... 232

**Oaths.** See TAXATION, 4.

**Occupation Tax.** See TAXATION, 1-3.

**Onus Probandi.** See ATTACHMENT.

**Opinion Evidence.** See EVIDENCE, 1, 2, 12, 14.

**Parties.** See GUARDIAN AND WARD, 1. NAMES. SURETYSHIP AND GUARANTY, 6.

Discretion of district court in permitting joinder of additional, not reviewed unless exercised prejudicially. *Caha v. Lipson*..... 776

**Partnership.** See CONTRACTS, 7, 8. SURETYSHIP AND GUARANTY, 2.

1. *Glade v. White* ..... 728
2. An arrangement to share profits, though not losses, by two persons, one of whom contributes capital and the other services, constitutes. *Roggencamp v. Hargreaves* ..... 542, 543
3. In an action against, for firm debt judgment may be rendered against one partner whose debt the testimony shows it to be. *Id.*..... 545, 546

**Passengers.** See CARRIERS.

**Patent Right.** See NEGOTIABLE INSTRUMENTS, 1.

**Payment.** See VOLUNTARY PAYMENT.

**Penalties.**

The recovery allowed under act of 1889, p. 369, to one whose exempt wages have been garnished is not a penalty. *Singer Mfg. Co. v. Fleming*..... 685, 686

**Personal Injuries.** See DAMAGES, 2. NEGLIGENCE, 9. REVIEW, 14.

**Pleading.** See BASTARDY, 1. EMINENT DOMAIN, 1. JUDGMENTS, 1. JURISDICTION, 1, 2. NOTICE. REVIEW, 12. TRESPASS. USURY, 4.

1. Defenses are not inconsistent unless proof of one disproves the other. *Blodgett v. McMurtry*..... 212, 213

**Pleading—concluded.**

2. Plea of estoppel may be joined with general denial. *Id.*
3. Jurisdictional defense, not appearing on face of record, may be joined with one to the merits. *Hurlburt v. Palmer*.....169-180
4. Reply may allege any new matter of defense not inconsistent with the petition. *Mollyneaux v. Wittenberg*..... 558
5. Motion for more specific statement is remedy for defects of form and not of substance. *Chicago, R. I. & P. R. Co. v. Shepherd*..... 527
6. Presumption is against the existence of a material fact not pleaded. *Id.*
7. Facts in nature of confession and avoidance must be specially pleaded in the reply. General denial puts in issue only allegations of new matter in answer. *Phoenix Ins. Co. v. Bachelder*..... 97
8. Contract, required by statute of frauds to be written, need not be alleged to be such, especially if no objection is raised until after verdict. *York Park Building Association v. Barnes*..... 839
9. Petition in action on corporate subscription which alleges that on a certain date, long past, the full capital stock was subscribed is sufficient on that point, at least if not objected to by motion. *Id.*..... 839

**Police Power.** See LIQUORS, 1.

**Practice.** See ERROR PROCEEDINGS. EVIDENCE, 7-10. HARMLESS ERROR. NOTICE. TRIAL.

**Presumptions.** See PLEADING, 6. REVIEW, 4, 7, 12.

**Principal and Agent.** See AGENCY. FACTORS AND BROKERS. USURY, 3.

**Principal and Surety.** See SURETYSHIP AND GUARANTY.

**Priority.** See JUDGMENTS, 3, 4.

**Privileged Communications.** See CONFIDENTIAL COMMUNICATIONS.

**Proceedings in Personam.** See TAX SALES.

**Proceedings in Rem.** See GUARDIAN AND WARD, 3.

**Prohibition.** See LIQUORS, 1.

**Promissory Notes.** See NEGOTIABLE INSTRUMENTS.

**Proximate Cause.** See BANKS AND BANKING, 2.

**Public Funds. See SCHOOL ORDERS.**

1. The phrase "several current funds," as used in sec. 1, Laws of 1891, p. 347, means all state money under state treasurer's control, and the provisions of the act apply to each of the different funds in the treasury. *State v. Bartley*.....357-363
2. Deposit of, in banks under above act is a loan, and so far as its provisions apply to permanent state educational fund, they are inoperative under sec. 9, art. 8, Const. *Id.*.....363-370
3. The term "voucher" defined and form set out and approved. *Moore v. Garneau* .....513, 514
4. State is liable at contract price for labor and materials furnished by virtue of a contract with World's Fair commissioner. *Id.*..... 515
5. A claim appealed to the district court after rejection by the state auditor must be presented there upon the same proofs; but if auditor's ruling is affirmed for deficient statement of claim, it may be again presented to the auditor and the defect remedied. *Garneau v. Moore* ..... 791

**Publication. See FORECLOSURE, 2.****Questions of Fact.**

1. *Anderson v. Vallery*..... 626
2. *Glade v. White* ..... 728
3. Negligence and contributory negligence are. *Omaha & R. V. R. Co. v. Brady*.....42, 43, 52, 53  
*Omaha Street R. Co. v. Craig* ..... 601
4. Negligence is, subject to province of court to say whether evidence justifies its submission, or supports the verdict. *Omaha Street R. Co. v. Clair* ..... 454
5. Whether grantee in conveyance assumes mortgage is. *Reynolds v. Diets* .....185-188
6. Fraud in a chattel mortgage is, where instrument is not fraudulent on its face. *Sherwin v. Gagbagen*.....249-251
7. Time and circumstances of the alteration of a promissory note are. *Courcamp v. Weber*..... 533

**Questions of Law.**

1. Construction of terms of a contract is. *Simms v. Summers*, 781
2. Negligence is, where reasonable men could not draw different conclusions from the facts. *Omaha Street R. Co. v. Craig* ..... 601  
*Woolsey v. C., B. & Q. R. Co.*..... 802

**Questions of Law—concluded.**

3. Sufficiency of "account of items" for mechanic's lien is, but compliance with statutory requirements generally is a mixed question of law and fact. *Wakefield v. Latey*...289, 290

**Quieting Title.** See ACTIONS QUIA TIMET. DEEDS, 2. LIMITATION OF ACTIONS.

**Quitclaim Deeds.**

1. *Violet v. Rose* ..... 675
2. *Pleasants v. Blodgett* ..... 741

**Railroads.** See DAMAGES, 5-8. EMINENT DOMAIN. NEGLIGENCE, 4-10.

1. Provisions of ch. 16, Comp. Stats., apply to both foreign and domestic corporations. *Myers v. McGarock*..... 874
2. Acquire only an easement in land condemned for railway purposes. *Id.*..... 875

**Rape.**

1. Evidence found sufficient to sustain conviction for. *Redfield v. State*..... 192  
*Hammond v. State* ..... 258
2. Instruction as to amount of resistance required of prosecutrix set out, and *held*, not open to the objection of giving undue prominence to age of prosecutrix and her relations to accused. *Id.*.....256, 257
3. Prosecutrix need be corroborated only as to material facts tending to prove the principal one; and not as to the particular act. *Id.*.....257, 258

**Receivers.**

Measure of damages for wrongful appointment of, by whom plaintiff's mercantile business was closed and the stock sold is value of latter when receiver took possession and actual loss from suspension during such possession. *Haverly v. Elliott*.....206, 207

**Recording.** See CHATTEL MORTGAGES. DEEDS, 1. VENDOR AND VENDEE.

**Religious Societies.** See TAXATION, 8.

**Remittitur.** See NEGLIGENCE, 9. REPLEVIN, 2. REVIEW, 14.

**Replevin.**

1. Where evidence fails to show title or right of possession in plaintiff, a judgment for defendant will be affirmed, regardless of erroneous instructions or admissions of testimony. *St. John v. Swanback*.....842, 843

**Replevin—concluded.**

2. A remittitur of that portion of a verdict for defendant in, which covers value of his possession, cures error in assessing damages therefor. *Id.*..... 843

**Reply.** See PLEADING, 4.**Reputation.** See BASTARDY, 3.**Res Adjudicata.** See SUBETYSHIP AND GUARANTY, 5.**Rescission.** See CONTRACTS, 8.**Restraint of Trade.** See CONVEYANCES.

**Review.** See COSTS. ERROR PROCEEDINGS. HARMLESS ERROR. JUSTICE OF THE PEACE. PARTIES. REPLEVIN, 2.

1. *Glade v. White* ..... 728
2. Instructions must be excepted to at trial in order to be reviewed. *American Building & Loan Association v. Mordock*..... 420
3. Affidavits to be considered must be embodied in bill of exceptions. *Barry v. Barry*..... 523  
*Aldrich v. Bruss*..... 569
4. Error must affirmatively appear and is never presumed. *Real v. Honey*..... 520
5. Error proceedings cannot be prosecuted without motion for new trial. *Shrimpton v. King*..... 779  
*Dillon v. State*..... 92
6. Findings below conclusive if supported by competent evidence. *Upton v. Lery* ..... 331  
*American Building & Loan Association v. Mordock*..... 421  
*Omaha Street R. Co. v. Clair* ..... 454
7. The presumption of correctness applies to findings of a court and to cases brought up on appeal as well as otherwise. *Burlingim v. Warner* ..... 497, 498
8. But admission of improper testimony in trial to court alone, and upon which judgment is based, is reversible error. *Courcamp v. Weber* ..... 538
9. A judgment for less than uncontracted evidence shows plaintiff in error entitled to will be reversed. *First Nat. Bank of Dorchester v. Smith* ..... 90
10. Improper evidence introduced under an evasion of the court's adverse ruling will be presumed to be prejudicial and is ground for reversal. *Bank of Commerce v. Goos* .... 437
11. The admission in evidence of an answer not responsive to the question, the latter being objected to, will not be con-

**Review—concluded.**

- sidered by the supreme court unless by motion to strike out, or otherwise, a ruling of the trial court on that particular testimony is invoked. *Violet v. Rose* .....661-670, 671
12. Where an answer traverses the allegations of the petition by references to numbers of lines therein, and such numbering is not preserved in the transcript, it will be presumed that all material allegations were denied. *Bellevue Improvement Co. v. Village of Bellevue* .....880, 881
13. Objections to form of verdict should be made in trial court. *Rogencamp v. Hargreaves* ..... 540
14. Verdict in action for personal injuries held to be generally sustained, but remittitur ordered as sums charged for medical service, of the fair value of which there was no evidence. *City of Friend v. Ingersoll*.....717, 727, 728
15. Evidence held sufficient to support findings of trial judge in support of creditor's bill. *Rathbun v. Dooley*..... 560

**Sales.** See CONTRACTS, 5, 6. JUDICIAL SALES.

**School Lands.**

Contract of purchase by a resident cannot be forfeited for non-payment of interest without personal notice. *State v. Clark*.....903-905

**School Orders.**

*Mandamus* will not lie to compel district treasurer to cash at maturity an interest-bearing order, payable at a definite future time, out of "the fund for general purposes." *State v. Sabin* ..... 570

**Schools.** See TAXATION, 7.

County superintendent cannot change boundaries of school district without giving the notice required by sub. 8, sec. 4, par. 3, ch. 14, Comp. Stats. *School District v. Coleman*, 396, 397

**Seals.** See TAX TITLES, 6.

**Settlement.** See ACCORD AND SATISFACTION.

*Glade v. White* ..... 728

**Sheriffs' Sales.** See DEEDS, 2.

**Signatures.** See HANDWRITING.

**Societies and Clubs.**

1. Members of a voluntary unincorporated association are not liable, unless by express contract, for debts incurred by it before they became members. *Hornberger v. Orchard* .....642-644
2. The liability of such members is governed by the law of agency. *Id.*..... 641

**Special Legislation.** See CONSTITUTIONAL LAW, 3, 4.

**State Auditor.** See PUBLIC FUNDS, 5.

**State Treasurer.** See PUBLIC FUNDS, 1, 2.

**Statute of Frauds.** See LEASE. PLEADING, 8.

1. A quitclaim deed signed by the parties, but neither witnessed nor acknowledged, is, as between them, a sufficient memorandum of a contract for conveyance. *Violet v. Rose*, 674, 675
2. A verbal promise by a mortgagee of live stock made to an agister who has a lien thereon for keeping, that if he will surrender possession to such mortgagee the latter will pay the amount due for keeping, is a direct promise and not within the statute. *Joseph v. Smith*..... 259

**Statute of Limitations.** See LIMITATION OF ACTIONS. USURY, 6.

**Statutes.** See CONSTITUTIONAL LAW, 3-5.

1. Must be so construed as to harmonize and give effect to all parts. *State v. Bartley*..... 358
2. A proviso should be construed as referring to what immediately precedes it, unless a different intent is apparent. *School District v. Coleman*..... 396
3. The construction placed upon a statute by the courts of another state after its enactment in Nebraska is not binding here. *Myers v. McGavock* .....847-863

**Stock (Corporate).** See BUILDING AND LOAN ASSOCIATIONS.

**Stockholders.** See PLEADING, 9.

1. One to whom stock is issued, who pays assessments thereon, acts as an officer and takes part in management of corporation, is estopped to deny his subscription. *York Park Building Association v. Barnes*..... 840
2. An agreement between promoters and subscribers that the latter need not pay is void. *Id.*
3. Subscription may be in parol. *Id.*..... 839

**Street Railways.** See NEGLIGENCE, 1, 2.

**Streets.** See ADVERSE POSSESSION, 1. MUNICIPAL CORPORATIONS, 1-3, 5-7. NEGLIGENCE, 5, 6.

**Subscriptions.** See STOCKHOLDERS.

**Summons.** See JURISDICTION, 2. NAMES.

**Suretyship and Guaranty. See CONTRACTS, 3.**

1. A surety signing a bond upon condition that he should be held liable only in case another surety signs it can claim the benefits of such condition only by showing that it was assented to by the obligee. *Owen v. Udall*..... 24
2. A partnership which accepts benefits under a building contract is liable on a bond for its performance to which the firm name is signed by one of its members, even though such signing is contrary to the articles of partnership. *Id.*.....20-22
3. Where the sureties on such bond claim release because of departures from plans and specifications, but the latter are not introduced in evidence, it will be presumed that there were no such departures. *Id.*..... 23
4. So as to alleged payments without required certificates, when the evidence fails to support such allegations. *Id.*, 25
5. A decree for mechanics' lien in favor of subcontractors cannot be invoked against the owner of the property in a subsequent suit by him on a bond signed by the subcontractors as sureties, though the subject of such suit is in part the repayment of the amount of such decree. *Id.*...25-27
6. A contract of guaranty running to a corporation cannot be enforced by it after it has changed its name. *Crane v. Specht*.....128-136

**Surprise. See TRIAL, 4.**

**Tacking Possession. See ADVERSE POSSESSION, 4.**

**Tax Deeds. See TAX TITLES, 3-7.**

**Tax Liens.**

- Attorneys' fees cannot be awarded in foreclosure of, where owner tenders full amount of principal and interest before trial. *Merrill v. Jones*..... 763

**Tax Sales. See TAX TITLES.**

- A sale to enforce tax liens, decreed in an action *in personam* and not against the land, passes title only of parties and privies; not that of strangers. *Carson v. Dundas*..... 503

**Tax Titles.**

1. Rule of *caveat emptor* applies to purchasers at tax sales. *Pennock v. Douglas County*..... 304
2. In the absence of a statute a municipal corporation cannot be compelled to refund money received by it from purchaser at county treasurer's sale for special taxes afterwards adjudged illegal. *Id.*.....297-304

**Tax Titles—concluded.**

3. Legislature may make tax deed *prima facie* evidence that every requirement necessary to its validity has been complied with. *Larson v. Dickey*..... 471
4. It may also make such deed conclusive evidence of directory and non-essential requirements, such as those relating to the manner of charging delinquent taxes, the place of sale, the price and the year's taxes for which sale was made. *Id.*.....472, 474
5. But it cannot make such deed conclusive evidence that the grantee therein named was the purchaser at tax sale or his assignee. *Id.*.....478-480
6. No valid tax deed can be executed in this state, because the law has failed to provide an official seal for county treasurers. *Id.*.....477, 478
7. Tax deed need not recite place of sale, or price, or year's taxes for which sale was made. *Id.*.....472, 474

**Taxation.**

1. Municipal corporations may impose taxes on occupations plied within their limits, but not upon a business conducted exclusively outside. *Western Union Telegraph Co. v. City of Fremont*.....698, 699
2. Hence they may impose upon telegraph companies doing business within their limits taxes for intrastate though not for interstate messages. *Id.*.....698-709
3. Such tax may be collected by ordinary action at law where statute so provides. *Id.*..... 693
4. Collection of regular and general taxes will not be enjoined because assessment was invalid; or because it was not based upon assessor's judgment; or because he failed to return an oath with the assessment roll. *Bellevue Improvement Co. v. Village of Bellevue*.....881-885
5. But a local assessment for sidewalks, before construction, contract, or estimate of cost is void, and the collection of the tax will be enjoined. *Id.*.....885-889
6. One who lists property with the assessor as his own is not entitled to an injunction restraining collection of the tax on the ground that the property really belonged to a corporation of which he is manager. *McGillin v Chase County*.....431, 432
7. Subdiv. 17, sec. 25, ch. 79, Comp. Stats. (3747, Cons. Stats.), requiring metropolitan school board to report to city council amount needed for certain purposes does not

**Taxation—concluded.**

entitle such board to compel the council to levy a tax for the amount so reported. *State v. Mayor and City Council of the City of Omaha*.....745

8. City lots owned by a religious society, but not used for religious purposes, and entirely distinct from the property on which a church edifice owned by the denomination stands, are not exempt from, though the church has decided to build a church edifice thereon at some future time. *First Christian Church of Beatrice v. City of Beatrice*, 432

**Telegraph Companies.** See TAXATION, 1-3.

**Tender.** See TAX LIENS.

*Anderson v. Vallery* .....630, 631

**Trespass.** See EMINENT DOMAIN, 1. RECEIVERS.

Plaintiff must allege ownership or possession at time of acts complained of. *Chicago, R. I. & P. R. Co. v. Shepherd*.... 527

**Trial.** See CHANGE OF VENUE. CROSS-EXAMINATION. EVIDENCE. HARMLESS ERROR. NEGOTIABLE INSTRUMENTS, 3. NEW TRIAL. REVIEW, 2, 5, 13. VERDICT.

1. Cross-examination must be confined to matters brought in chief. *Hurlbut v. Hall*..... 892
2. Sustaining of a general objection not a ground of reversal, especially where no exception was taken. *Id* .....894, 895
3. Motion to strike out irresponsible answers must be made in order to have error in admitting them reviewed. *Violet v. Rose* .....667, 670, 671
4. Leave to withdraw a juror and continue the case is discretionary with trial court, and refusal thereof is not error when asked only upon the ground that the applicant expected certain evidence, admitted under the pleadings, to be ruled out. *Id*..... 669
5. Imputations upon veracity of witnesses by opposing counsel in argument to jury, held proper and warranted by the evidence. *Omaha & R. V. R. Co. v. Brady*.....45-47

**Trusts (Commercial).**

A contract not to use premises for hotel purposes is not within the provisions of the anti-trust law. *Mollyneaux v. Wittenberg* .....556, 557

**Trusts (Equitable).** See FACTORS AND BROKERS. MORTGAGES, 2.

**Unincorporated Associations.** See SOCIETIES AND CLUBS

**Usury.**

1. When original loan is usurious it taints all renewals.  
*Exeter Nat. Bank v. Orchard*..... 485  
*Doyle v. Holland*.....89, 90
2. Loan of money for one year at twelve per cent is not purged of usury because borrower retains it for a second year paying only eight per cent. *Id.*
3. Where an agent charges a bonus or collection fee of \$10 for a loan of \$165, and makes the note for the entire \$175, payable to his principal, such note is usurious. *Anderson v. Vallery* .....628, 629
4. Plea of, must state facts showing when, where, at what rate, and with whom alleged usurious agreement was made; otherwise no evidence should be admitted in support of it. *Rainbolt v. Strang* ..... 339
5. In an action by a national bank to recover on renewals to it of usurious notes given to a private bank which plaintiff has succeeded, defendant is entitled to have all payments of interest applied on the principal, and he is not estopped from claiming this right by the fact that he has made such renewals to the national bank and has also sued and recovered from it the penalty provided by the federal statute. *Exeter Nat. Bank v. Orchard*..... 485
6. This application of interest payments on principal is not in the nature of a set-off or counter-claim and is not barred by the statute of limitations. *Id.*.....490, 491

**Value.** See DAMAGES, 6. FRAUD, 1, 2.

**Vendor and Vendee.** See CONTRACTS, 5, 6. DAMAGES, 9.  
 FRAUD, 1, 2. FRAUDULENT CONVEYANCES, 2, 3.  
 SCHOOL LANDS.

1. Purchaser of real property is charged with notice of occupant's rights. *Pleasants v. Blodgett*..... 743
2. Grantee of quitclaim deed takes only grantor's existing interest. *Id.*
3. Record of mortgage is notice to intending purchaser, of mortgagor's interest. *Id.*

**Venue.** See ACTIONS. CHANGE OF VENUE.

**Verdict.**

Defect in title of, will not vitiate. *Roggencamp v. Hargreaves*,  
 544, 545

**Verification.**

*City of Friend v. Ingersoll*.....722, 723

**Voluntary Payment.**

1. Money paid for property purchased at county treasurer's sale for special taxes afterward adjudged illegal is. *Pennock v. Douglas County*.....297-304
2. Payment of another's debt for which payor was not liable, induced by acts and expressions of payees and their attorney indicating that they would attach his stock of goods and ruin his business, is not. *Weber v. Kirkendall*.....196-200

**Vouchers.** See PUBLIC FUNDS, 3.

**Wages.** See GARNISHMENT, 2-5.

**Waiver.** See COMPLETE RECORD. JURISDICTION, 1-3.

**Warehousemen.**

- Action against operators of cold storage warehouse for negligence in failing properly to preserve eggs stored there; judgment for plaintiff affirmed. *First Nat. Bank of Omaha v. Krug* ..... 208

**Warrants.** See SCHOOL ORDERS.

**Waste.**

- Action to restrain; decree of trial court upon findings that no waste had been committed affirmed. *St. Clair v. Sedgwick* ..... 562

**Wills.** See ADMINISTRATION OF ESTATES, 3, 4.

**Witnesses.** See CONFIDENTIAL COMMUNICATIONS. EVIDENCE. HANDWRITING.

**Words and Phrases.**

1. "Benefits;" general, common, special. *Kirkendall v. City of Omaha*.....6-8
2. "Creditors." *Farmers & Merchants Bank of York v. Anthony* ..... 348
3. "Current funds." *State v. Bartley* .....357-363
4. "Due process of law." *Larson v. Dickey* .....479, 480
5. "Investment." *State v. Bartley* .....363-368
6. "Loan." *Id.*
7. "Negligence." *Omaha Street R. Co. v. Craig* ..... 616
8. "Passengers." *Woolsey v. Chicago, B. & Q. R. Co.*..... 801
9. "Pools." *Mollyneaux v. Wittenberg* ..... 557
10. "Probable cause." *Jonasen v. Kennedy* .....319, 320
11. "Situated." *Fremont Butler & Egg Co. v. Snyder* .....634, 635
12. "Subsequent purchasers in good faith." *Farmers & Merchants Bank of York v. Anthony*..... 350
13. "Trusts." *Mollyneaux v. Wittenberg*..... 557
14. "Voucher." *Moore v. Garneau*..... 511

**Writs.** See JURISDICTION, 2.

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